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NOTES OF RECENT CASES.

Venkataramana Rao, J. S. A. No. 1169 of 1932.
29th July, 1937.

Limitation Act (IX of 1908), S. 10—'Alienated land' within Madras Regulation 31 of 1902—Pre-settlement Mokhasa in a Zemindari—Attachment of, by Zemindar for arrears of rent under S. 34, cl. (6) of Madras Regulation 28 of 1902—Possession taken by Zamindar—If an "express trustee" within the meaning of S. 10, Limitation Act—Subsequent sale of Zamindari for arrears of peishcush—Government getting into possession—Writing off of arrears—Resumption of Mokhasa—Return of Zamindari to Zamindar—Regrant of Mokhasa to him—Effect of—Undisturbed possession by Zamindar for over 12 years, with knowledge and acquiescence of Mokhasadars—Adverse possession.

A suit was brought by the plaintiff for possession of a 1/36th share in a Mokhasa *T* situate within *N* Zemindari. The Zamindars (defendants 1 and 2) and their predecessors got into possession of the *T* Mokhasa about 75 years ago and ever since have been in open, continuous and undisturbed possession and enjoying the properties in their own right. The village *T* was a pre-settlement Mokhasa and subject to a Kattubadi at the permanent settlement. It is therefore an "alienated land" within the meaning of the preamble to Madras Regulation 31 of 1902 and therefore the right of resumption inhered in Government by virtue of cl. (4) of Regulation 25 of 1902. The Zemindari was now and then being managed by the Court of Wards. In 1831, the suit Mokhasa was attached for arrears of rent under S. 34, cl. (6) of Madras Regulation 28 of 1902. The Zemindari itself was sold for arrears of peishcush in 1843 and regranted in 1845. Again in 1851 the Zemindari was sold for peishcush and possession taken by Government and it continued so till 1860. The Government then resumed the Mokhasa in 1856 and incorporated it with Government land but still the obligation to pay the Kattubadi remained. The Government as owners of the Zemindari wrote off the arrears.

But when the sale of the Zemin was set aside, the Government regranted the Mokhasa to the Zemindar. From 1860 the Zemindar was holding the Mokhasa in his own right free from and discharged of all claims of the Mokhasa. It was found that the resumption proceedings were with the knowledge of the Mokhasadars and that they acquiesced in the same and abandoned their right to the Mokhasa. In 1884 an attempt to recover the Mokhasa failed. In this suit it was contended that the Zamindar held the Mokhasa as an express trustee by virtue of attachment and that therefore the suit was not barred.

Held, that when property is attached under S. 34, cl. (6) of the Madras Regulation 28 of 1902 there is no transfer of property nor is there a right to call for a transfer of property. The only right is to manage the property until the amount due is discharged. No right of disposal over property is given. But for this there is no right to landlord to enter on the land. The possession of the tenant is therefore displaced by statute and it is not by virtue of any confidence reposed by the Mokhasadar in the Zemindar that possession is taken but in opposition to and in derogation of his rights as owner to remain in possession. The relationship thus created by attachment can in no sense be one of trustee and *cestui que trust.*

I.L.R. 8 Bom. 585 and I.L.R. 39 Bom. 572, distinguished.

Assuming that by virtue of the statutory obligation to account for management and to deliver possession of the land a constructive trust can be raised, there has been open disclaimer of the title of the Mokhasadars and a renunciation of the character of possession which will set the statute running from the date of disclaimer or renunciation. The result of the Government buying the Zemindari, writing off the arrears and regranting the Zemin, etc., to the Zemindar was to put an end to the relationship created by the 1831 attachment and therefore from 1860 onwards the Zemindar held the Mokhasa in his own right free and discharged of all claims of the Mokhasa.

I. L. R. 34 Mad. 257, distinguished as here there has been a complete divestment of any fiduciary character, assuming the Zemindar held such before.

G. Lakshmanna and *G. Chandrasekara Sastri* for Appellant.

P. Somasundaram, Y. Govindarajulu, P. V. Rajamannar, K. Subba Rao and *V. Suryanarayana* for Respondents.

S. V. V.

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The Chief Justice and Varadachariar, J. O. S. A. No. 2 of 1937.
22nd July, 1937.

Civil Procedure Code, S. 92---Suit by a trustee against co-trustee for account—If sanction necessary.

The suit temple is a Hindu temple belonging to a sect of the Hindus. The plaintiffs brought the suit as trustees against their co-trustees for an account and other reliefs. At a meeting of the community the plaintiffs and defendants were elected as trustees for the purpose of collecting subscriptions, for the improvement of the temple, for the performance of the rites therein and for the conduct of festivals and other cognate matters, with power to spend the collections on these objects. It was alleged that the defendants 1 and 2 alone were acting as the managing trustees and were in charge of all the monies, that large sums of money were collected and spent by them for their own purposes. It was conceded that this was a public trust and the question was if the suit, without the sanction of the Advocate-General under S. 92, Civil Procedure Code, was maintainable and if I.L.R. 45 Mad. 113 is still good law after I.L.R. 55 Cal. 519 and I.L.R. 58 Mad. 988.

Held, that I.L.R. 45 Mad. 113 is still good law and there is nothing in I.L.R. 55 Cal. 519 or I.L.R. 58 Mad. 988 against it. Sub-S. (2) of S. 92, though expressed in general terms, must be read along with sub-S. (1) and it follows on such reading that it is not every suit claiming any of the reliefs specified in sub-S. (1) that should be brought with the consent of the Advocate-General, but only those suits which besides claiming any of those reliefs are brought by individuals as representatives of the general public.

K. V. Sesha Aiyangar and *R. Gnanasambandan* for Appellant.

K. Narasimha Aiyar, T. V. Subramania Aiyar and *T. R. Srinivasa Aiyangar* for Respondents.

S. V. V.

The Chief Justice and Varadachariar, J. O. S. A. No. 63 of 1936.
29th July, 1937.

Indian Christian Marriage Act (XV of 1872)—Marriage with a girl above 18 but below 21 before a Registrar—False declaration by the husband that the girl was 22 and living within the Registrar's jurisdiction—Marriage solemnised—Certificate of marriage issued—Marriage if void.

The marriage of the respondent, who was then a major, with an Indian Christian girl, aged 18½ years at the time, was solemnised

before the Marriage Registrar of St. Thomas Mount. The respondent gave notice of the marriage to the Registrar at St. Thomas Mount falsely declaring before him (*i*) that the girl was 22 years old then and (*ii*) that both the parties resided at St. Thomas Mount. The respondent took the oath required by S. 42 and made the two false declarations. As the result of the false declaration made by the respondent, he obtained a certificate which entitled him and the girl to be married, there being no statement in it showing any lawful impediment to the marriage. The father of the girl and the girl filed a suit for a declaration that the marriage was a nullity because of the false declarations.

Held, that this argument ignores the provisions of Ss. 4 and 5 and would read into Part V of the Act provisions which are not there. The Registrar who solemnised the marriage was authorised by law to solemnise it, and having been solemnised by an official authorised in this respect it cannot be declared to be void under S. 4. By reason of the false declarations, the husband has rendered himself liable to punishment under S. 66 but that does not render the marriage illegal. The parties were in a position to contract a lawful marriage and such a marriage was solemnised by the Registrar in accordance with the provisions of the Act and as such it is not rendered void merely by this declaration.

T. R. Venkatarama Sastriar and *T. Krishnaraja Naicker* for Appellant.

T. A. Srinivasan for Respondent.

S. V. V.

Newsam, J. C. R. P. No. 610 of 1936.
30th July, 1937.

Court-fee—Pledge of jewels—Suit by pledgor for recovery of jewels or their value—Valuation for purposes of court-fee and jurisdiction.

Where a pledgor of jewels sued for recovery of the pledged jewels or their equivalent money value and valued the suit for purposes of court-fee and jurisdiction on the amount payable by him under the pledge,

Held, that the valuation adopted by the plaintiff was proper.

S. Venkatesa Aiyangar for Petitioner.

M. S. Venkatarama Aiyar and *C. K. Venkatanarasimhan* for Respondents.

B. V. V.

Venkatasubba Rao and Newsam, JJ. Appeal No. 290 of 1935.
3rd August, 1937.

Land Acquisition Act—Rule of 20 year's purchase—If a rigid rule or can be varied.

There is no uniform or rigid principle in regard to the number of years purchase to fix the capital value of the land acquired by Government under the Land Acquisition Act. It will vary according to the interest paid on gilt-edged securities at the time, etc.

11 C.W.N. 878; I.L.R. 16 Mad. 369 and I.L.R. 10 Cal. 774, referred to.

The Government Pleader (*K. S. Krishnaswami Aiyangar*) for Appellant.

V. Govindarajachari for Respondent.

S. V. V.

Venkatasubba Rao and Newsam, JJ. Appeal No. 228 of 1932.
3rd August, 1937.

Provincial Insolvency Act—Composition scheme—Scheme providing for insolvent's properties being sold to two sureties on condition of their paying 5 annas in the rupee—Creditors paid—Official Assignee conveying 'right, title and interest of insolvent' in properties—If it conveys also son's undivided interest therein.

In I.P. No. 2 of 1927 (Rangoon High Court) a firm of Nattukottai Chettiars, of which the father of each defendant was a partner, was adjudicated insolvent. On 17th January, 1928, a composition scheme was approved by the Court by an order which stated that the Official Assignee was to be paid his expenses and commission, and that the creditors agreed to receive and were guaranteed payment of five annas in the rupee by two Chettiar firms, who were described as sureties but who were to be in reality the purchasers of the entire assets of the insolvent firm. In pursuance of this scheme the purchasers of the assets paid Rs. 52,173-9-9 privately to certain creditors and Rs. 55,450-0-0 to the Official Assignee for distribution to the remaining creditors. These payments amounted to paying five annas in the rupee of the insolvent firm's liabilities. Thereupon the Official Assignee transferred by deed all the assets of the insolvents described in the schedule "with all the right, title and interest of the said insolvents therein" to the purchasers. The surety purchasers then sold the suit house to plaintiff for Rs. 75,000 and the undivided sons of the insolvent objected, contending that their shares could not be taken under that.

Held, that as there was no question that the debts were immoral or illegal, the pious obligation of the son to pay the father's debts rendered the sons also liable and in exercise of that right the father and the Official Assignee could have conveyed the

son's interests. The word 'asset' of the father and 'right, title and interest' in the deed had the effect of conveying also the shares of the sons.

V. Ramaswamy Aiyar for Appellant.

S. Parthasarathy and *V. K. Thiruvenkatachari* for Respondent.

S. V. V.

The Chief Justice. C. R. P. No. 1169 of 1935.
6th August 1937.

Madras District Municipalities Act (V of 1920)—Profession Tax—S. 93 and r. 17 of Schedule IV—Meaning of "holding office or appointment" and "place of employment"—Difference in the language of S. 93 of the present Act and the corresponding section of the old Act—Effect of leave preparatory to retirement and prefixing summer vacation of Court to leave—Fundamental Rules.

M was the District and Sessions Judge of Kistna with headquarters at Masulipatam from 1st April, 1931, till 4th May, 1931. The District Court was closed for the summer vacation fron 4th May, 1931, till 6th July, 1931. *M* was due to retire from service on 31st July, 1931. He applied for and obtained leave from 6th July, to 30th July, 1931, preparatory to retirement with permission to prefix the summer vacation to his leave, and left Masulipatam for good on 4th May, 1931. *M* spent the vacation at Kodaikanal and other places. The Sessions Judge, West Godavari, in addition to his duties was appointed Additional Sessions Judge, Kistna, during the summer vacation. During the summer vacation *M* did some administrative work at Kodaikanal in connection with the office of the District Court, Kistna.

Held, (1) that after 4th May, 1931, *M* did not hold the appointment of District and Sessions Judge of Kistna within the Municipality of Masulipatam nor was Masulipatam the place of *M's* employment within the meaning of S. 93 and r. 17 of Schedule IV of the District Municipalities Act;

(2) that the fact that *M* did some administrative work at Kodaikanal would not render him liable to pay the professional tax;

(3) that the Madras District Municipalities Act being a taxing statute must be strictly construed; and

(4) that *M* was not liable to pay profession tax for the 1st half year of 1931-32 as he did not hold the appointment within the Municipality of Masulipatam for the minimum period of 60 days.

I.L.R. 17 Mad. 453, I.L.R. 22 Mad. 145 and I.L.R. 38 Mad. 879, considered.

R. Swaminatha Aiyar for Petitioner.

V. Govindarajachari for Respondent.

S. V. V.

The Chief Justice and Varadachariar, J. O. S. A. No. 39 of 1936.
28th July, 1937.

Will—Proof of—Rule in Tyrrell *v.* Painton—*When applicable —Surrounding circumstances not exciting suspicion—If rule applies, merely because of some unnaturalness in the legacies.*

The testator, a resident of Madras, died in a village outside Madras on 17th March, 1934, leaving a will dated 19th January, 1934. He made provisions therein for performance of certain ceremonies and then provided that his wife should be given Rs. 12 per mensem and another Rs. 12 per annum for clothing and that the balance should go to his younger brother. He appointed three executors. The wife contested the will pleading that the testator was not in full possession of his mental faculties at the time of the execution of the will and that he was influenced by his brother. The testator was taken ill in October, 1933. He was then aged 65. He consulted an advocate who prepared a draft according to testator's intentions and handed it over to the testator on 23rd October. Nothing more was done till January, when about the 19th his health was affected again. The testator thereupon instructed his brother's son's tutor to write up the will as per the advocate's draft and then signed and registered it in person at the registrar's office. Then he left for his village and lived there till his death. In between January and March the testator had written letters to his brothers referring to the will. It was contended that the case fell under the rule in *Tyrrell* v. *Painton,* (1894) Probate 151 inasmuch as the wife was given a very small maintenance.

Held, that as pointed out in I.L.R. 27 Cal. 521 and I.L.R. 38 Cal. 355 the rule requiring proof that the testator actually knew and approved of the contents of the will does not apply unless the surrounding circumstances excite suspicion. Merely showing that there was motive and opportunity for the exercise of undue influence and that some of them benefited by the will to the detriment of other relations of equal or nearer degree is not enough to establish undue influence. They might excite suspicion and lead the Court to scrutinise the evidence carefully, but in order to set aside the will, there must be clear evidence that the undue influence was in fact exercised or that the illness of the testator affected his mental faculties as to make him unequal to the task of disposing off of his property.

T. C. A. Bashyam and *T. C. A. Thirumalachariar* for Appellants.

V. Radhakrishnayya and *V. Sambandam Chetti* for Respondents.

S. V. V.
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Varadachariar, J. C. R. P. No. 1165 of 1935.
6th August, 1937.

Hindu Religious Endowments Act (II of 1927), S. 84—Decision by Board that a temple is a public temple—Suit to set aside the decision—No evidence before Board but only affidavits—If affidavits evidence before Court—Meaning of 'Public.'

In deciding whether a temple is a public temple, the reference to the 'public' can only be such public as can worship in the temple and available in the locality in question. Where in a village Hindu inhabitants are very few, public can only mean the Hindu public in the locality.

The Board acted on the affidavits filed during the proceedings before it in proof of the practice of outsiders to come and worship at the temple. The Court in the suit acted upon the affidavits.

Held, that it is true that the proceedings before the District Court under S. 84 have been held not to be merely in the nature of an appeal so as to preclude the parties from leading fresh evidence before the Court, but that is very different from saying that the proceedings before the Court are so wholly *de novo* that the materials placed before the Board should not be regarded as part of the record of the enquiry. The fact that the deponents of affidavits were not examined before Court may be an important circumstance to be borne in mind in appraising the value of such evidence, but it is too much to say that the materials that are before the Board should be treated as not forming part of the record of the enquiry before the Court.

V. Rangachari for Petitioner.
K. Subba Rao for Respondent.
S. V. V.

The Chief Justice and Varadachariar, J. O. S. A. No. 73 of 1936.
9th August, 1937.

Presidency Towns Insolvency Act (II of 1909), S. 9, cl. (g)—Act of insolvency—Agreement between debtor and creditor that default in payment of his debt should be treated as notice of suspension of payment—If estops debtor from objecting to adjudication—If such non-payment amounts to notice of suspension of payment.

In 1935 one *M* was indebted to one *R* in a sum of over Rs. 2,000 on a promissory note and a sum of Rs. 317 odd under a decree. In execution of the decree, *R* attached a house belonging to *M*. The attachment continued for more than 21 days and

basing on that a petition was filed by *R* in February, 1936, to adjudicate *M* an insolvent. As a result of an arrangement between the parties, made outside Court, the petition was withdrawn on *M* executing a mortgage deed undertaking thereby to pay a sum of Rs. 400 by 15th June, 1936, Rs. 500 by 15th December, 1936, and the balance in two equal instalments within one year thereafter. It was also provided in the document that "in case of default of any one payment as aforesaid the mortgagee shall be at liberty to take *further* proceedings in insolvency and the mortgagor shall not raise any objection thereto and this act of default itself will then be treated as an act of insolvency on the part of the mortgagor as amounting to a suspension of payment within the meaning of the Act". *M* failed to pay even the first instalment and then *R* filed this fresh petition in August, 1936, for adjudicating *M* as an insolvent alleging this default as one of the acts of insolvency.

Wadsworth, J., held that *M* is estopped by reason of the execution of the mortgage deed . . . . from contending that his subsequent failure to pay Rs. 400 on or before 15th July, 1936, does not amount to a notice to his creditor that he has suspended payment of his debts and has committed an act of insolvency.

Held, on appeal, that the law of estoppel does not operate and cannot operate to prevent the provisions of the Insolvency Act having effect. It will be an act of insolvency if a debtor gives notice to any of his creditors that he has or is about to suspend payment of his debts generally and not of payment of any particular debt. The fact that the insolvent and his creditor agreed that default in payment of an instalment under the mortgage should be treated as an act of insolvency does not make it incumbent upon the Court to regard it as an act of insolvency. The agreement cannot be deemed to constitute the non-payment an act of insolvency.

Satagopa Srinivasaraghavan for Appellant.

E. R. Krishnan for Respondent.

S. V. V.

Venkatasubba Rao and Newsam, JJ. A. S. No. 267 of 1931.
10th August, 1937.

Hindu Religious Endowments Act (II of 1927), S. 73—Suit by worshippers for a declaration that certain persons are not entitled to emoluments as of right—If maintainable.

A suit was brought by certain worshippers of a temple with the consent obtained of the Board of Commissioners, to get a declaration in respect of a class of persons who were claiming a fixed share of the *prasadams* offered to the deity. It was found

that they were not in enjoyment of the allowances for such period as would serve to raise a presumption of a legal origin and that the emoluments were not attached to the performance of any religious office, service or duty in the temple. The trustees, the members of the Devastanam Committee, and the emolument claimants were made parties to the suit. The plaintiffs did not want to fetter the discretion of the trustees in doling out the offerings even to them as a matter of charity, if they felt the persons to be deserving but the suit aimed at getting a declaration that they are not *as of right entitled* to receive a fixed share of the *prasadams* and an injunction restraining the trustees from allowing such a claim by making a cash payment to them as such or in lieu of any so-called vested interest in the offerings. The question was if the suit was maintainable under S. 73 of Act II of 1927.

Held, that the present suit is entirely outside the scope of S. 73. The suit is not in respect of the administration or management of the temple. The right of the trustees or of the committee to make charitable doles is not questioned. What the plaintiffs ask is to have their right declared as against certain third parties, that is, strangers to the trust. Such a suit does not come under S. 73 and cannot be said to be barred by it. The further relief that trustees and committee shall be restrained from giving and the emolument claimants from receiving, is merely ancillary to and consequential upon the declaration.

T. M. Krishnaswami Aiyar and *V. N. Venkatavaradachari* for Appellants.

K. R. Rangaswami Aiyangar for Respondents.

S. V. V.

Pandrang Row and Venkataramana Rao, JJ.
12th August, 1937.

Appeal No. 391 of 1931.

Hindu Law—Inheritance—Father's half sister's son and mother's brother's son—Preferential heir.

Under Hindu Law as between a father's step sister's son and a mother's brother's son, the father's step sister's son is the preferential heir.

I.L.R. 59 Cal. 575, followed.

P. S. Raghavarama Sastri for Appellant.

K. Bashyam, V. R. Venugopalan and *Kasturi Seshagiri Rao,* for Respondent.

S. V. V.

The Chief Justice and Varadachariar, J.
3rd August, 1937.

C. C. C. A. No. 40 of 1935.

Res judicata—*Suit on foot of a document being invalid—Later suit on foot that document valid but entitled to damages as title under it is lost—If* res judicata– *Civil Procedure Code, S. 80—Official Assignee—If a public officer—Suit against Official Assignee as representing an estate—If notice under S. 80 necessary.*

One *D* was the plaintiff's father and the brother of one *K*. The said *K's* wife was one *J*. A piece of immovable property was purchased in the joint names of *D* and *J* for Rs. 200. *D* having died, *V* (plaintiff) filed a suit O. S. No. 437 of 1937 for partition and possession of his half share. *J* defended the suit claiming that her husband was the purchaser. The suit was compromised. Under this the plaintiff was to pay Rs. 700 to *J* as for her interest. But prior thereto *J* had mortgaged this property to one *D A* and it was not known to the plaintiff. The plaintiff paid Rs. 700 in June, 1928, but as he had by then discovered the mortgage, he applied for the money being kept in Court without being paid to *J* and got an order to that effect. Then the plaintiff filed O. S. No. 424 of 1929 against *J* and *D A* for a declaration that the mortgage was invalid. The Court held in August, 1930, that the mortgage was good up to *J's* share and gave a decree to the plaintiff subject to the mortgage. An appeal against it by *D A* was dismissed in September, 1932. Pending appeal *J* was adjudicated on 27th April, 1931. On 9th April, 1931, the plaintiff had withdrawn the Rs. 700 from Court. The Official Assignee claimed this sum back and Rs. 738-8-0 was paid on a deed of release executed by the Official Assignee in favour of plaintiff in respect of *J's* half share in the property. In execution of *D A's* mortgage decree, the half share was purchased by a third party on 6th March, 1933. As a result therefore the plaintiff got nothing for his Rs. 738-8-0 because the property had got into a third party's hands in execution sale. Thereupon plaintiff filed O.S. No. 406 of 1932 against the Official Assignee on the basis that the release deed had no legal effect. But it was dismissed on the ground that the payment was made by the plaintiff voluntarily. Thereupon the plaintiff filed this suit on the basis that the Official Assignee granted to him a good title which has been lost and that therefore the Official Assignee was liable in damages.

Held, that O. S. No. 406 of 1932 did not operate as *res judicata* as it was filed on the basis that the deed of release was of no legal effect but this is on a different cause of action that the document is a valid one and that the plaintiff is entitled to damages for breach of a covenant contained in it.

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S. 80, Civil Procedure Code does not bar the suit either. The Official Assignee is a 'public officer' within the meaning of the section and S. 80 covers both cases in contract and in tort. But the Official Assignee in executing the deed of release was not doing an act in his official capacity and further the suit is not against him in respect of any act done by him in that capacity. The claim is not against him personally but against him as representing the estate of *J.*

I.L.R. 61 Cal. 470, followed.

K. S. Krishnaswami Aiyangar and *N. C. Vijiaraghavachariar* for Appellant.

V. Ramaswami Aiyar for Respondent.

S.V.V.

Pandrang Row and Venkataramana Rao, JJ. Appeal No. 304 of 1934.
4th August, 1937.

Mortgage—Mortgage by members of a Mahomedan family—No attesting witness called—Evidence Act, S. 70—'Admission', meaning of—Proof of mortgage.

In a suit on a security bond alleged to have been executed by members of a Mahomedan family consisting of defendant 1 and his brothers defendants 2 to 4 and his sister the 5th defendant, defendants 3 and 4 pleaded that when they signed the bond there were no signatures of attesting witnesses and there were also no alterations and interlineations as were now found on the bond. The lower Court had passed a decree though no attesting witness was called to prove execution and there was also no evidence of attestation as required by law.

Held, that the plaintiff was bound to adduce such evidence and there was no admission of execution within the meaning of S. 70 (Evidence Act) which must be understood to mean "due execution as required by law".

I.L.R. 5 Pat. 58, followed.

An admission within the meaning of that section (S. 70) must be one in the pleadings or in the course of the trial of the suit and cannot include an admission of execution alleged to have been made in another document.

I.L.R. 27 Cal. 190, followed.

4 P.L.J. 511, not approved.

Further the decree against the 5th defendant cannot be sustained as there was no evidence of the bond having been read and explained to her.

S. Ramaswami Aiyar for Appellants.

M. S. Vaidyanatha Aiyar for Respondent.

S. V. V.

The Chief Justice and Varada-chariar, J. O.S.A. Nos. 26, 27, 28 of 1937.

12th August, 1937.

Company—Directors—New company started—One director left in charge—Misappropriation by—Extent of liability of other directors—Companies Act, S. 103—Certificate under, obtained by false declaration of a director—Facts known to other directors—Liable for liabilities of the company.

The company was registered on 11th May, 1933, for the purpose of doing all kinds of banking business. On 7th September, 1933, the certificate under S. 103 of the Companies Act was obtained for commencing business. In February, 1934, the business ceased to be carried on and on 6th April, 1934, a winding up order was made. Respondents 1 to 8 were directors appointed under the Memorandum of Association. The 9th respondent was the promoter and he arranged that he should be appointed legal adviser to the company and the "advisory director." In or before 1931 he was carrying on a business which had failed. He became an insolvent and was an undischarged insolvent at the time this company was started and has since remained so. The entire business of the company from its incorporation until August, 1934, was entirely in his hands. All moneys paid to the company were received by him and he had entire control over them. Included in these monies were some amounts paid to him by way of security by those who became employees of the company. The respondents (directors) took little or no part at this period in the company's activities. They exercised no control or supervision over the 9th respondent and left him solely in charge. Before the company was incorporated a draft agreement had been prepared under which the company was to advance to him Rs. 10,000 on the security of his interest in the assets of his earlier business and a life policy of Rs. 10,000. It was arranged that of this Rs. 5,000 should be paid to redeem his assets from the Official Assignee. A fair agreement was executed after the company was incorporated. The Official Liquidator claimed from the other directors (*i*) the sums misappropriated by the 9th respondent from the security deposits and (*ii*) a sum representing the liabilities incurred by the company. Article 95 of the Articles of Association indemnified the Directors for anything done by them except where loss has been incurred as the result of wilful neglect or wilful default on their part. Respondents had no reason to suspect the integrity of the 9th respondent, though he was an undischarged insolvent. There was no reason for them to suspect that the 9th respondent would utilise the security deposits for his own use.

Held, that in view of the indemnity clause (Art. 95) not only must a director, to become liable, be guilty of negligence, but he

must know that he is committing a breach of duty or is recklessly careless in the matter. The respondents were justified in trusting the chairman and 9th respondent to deal properly with the employees.

(1925) 1 Ch. 427, followed.

A director is justified in trusting the officials of the company, so long as he is acting honestly.

(1899) 2 Ch. 629 and (1901) A.C. 477, applied.

The second head of claim stands on a different footing. The minimum subscription had been subscribed, but the amounts due on them by the directors had not all been paid and the certificate under S. 103 permitting the company to commence business was obtained by a false declaration made by the 9th respondent. The respondents knew of the obtaining of the certificate. They therefore wilfully permitted the company to carry on business on the strength of that certificate. In any event they must be deemed to know the law and that the business cannot be begun under S. 103. Therefore as for item (2) the directors were guilty of wilful negligence and liable to pay under S. 235. Though the respondents might have acted honestly, it cannot be said they acted reasonably and therefore they cannot be relieved from the consequences of their wilful negligence under S. 281.

K. Krishnaswami Aiyangar, E. Antony Lobo, S. R. Subramaniam, K. C. Subramaniam Chettiar, O. Rajavelu Chetty and *A. Ramaswami* for Appellants.

A. Westmorland Wood for Respondents.

S. V. V.

The Chief Justice and Varadachariar, J. — C. C. C. A. No. 1 of 1936.

19th August, 1937.

Banking—Rule of bank empowering it to close an account without notice—If illegal or opposed to public policy.

A rule in the Bank read "The bank reserves to itself the right to close any account without any reference to the depositor if in the opinion of the bank it is not desirable to keep such account for any reason whatsoever".

Held, that as it is not in violation of a statutory obligation, there is no reason why parties should not contract themselves in this manner if they chose to do so. The rule is in the nature of a contract entered into between the parties. There is nothing immoral or opposed to public policy.

C. Chellam Aiyangar and *P.G. Raghavendra Rao* for Appellant.

Dr. V. K. John for Respondent.

S. V. V.

Burn and Lakshmana Rao, JJ. C. M. A. No. 325 of 1934.
6th August, 1937.

Limitation Act, Art. 182, cl. (5)—"Final order"—Meaning of —Order returning the petition—If a final order--Decree transferred to another Court—No certificate of non-satisfaction by the transferee Court—If Court which passed the decree competent to entertain an application for execution.

The first respondent was the decree-holder and he got a decree in the Sub-Court, Cocanada, for over Rs. 25,000. The decree stated that "the plaintiff do proceed against the first and second defendants (respondents 2 and 3) in the first instance and against the third defendant (appellant) in case the amount cannot be realised from 1 and 2 defendants". A sum of about Rs. 3,650 was realised by 1926 by execution against respondents 2 and 3 and two applications were filed by the decree-holder on 18th January, 1927, for transmission of decree to the District Munsifs of *K* and *R* places for simultaneous execution against 2 and 3 respondents. The applications were ordered on 20th January, 1927, and the decree copies were transmitted to *K* and *R* Courts. No steps were however taken there and an application for transmission to Sub-Court of *V* was filed again in Sub-Court, Cocanada, on 20th January, 1930. The execution application was returned for amendment on 9th October, 1930, for remedying certain defects but was not represented. The next execution application was filed on 27th September, 1932, for transmission to District Court of South Arcot for execution against all, the appellant and 2 and 3 respondents. It was argued that once a decree is transmitted to another Court for execution that Court alone can execute it and the Court which passed the decree is not competent to entertain an execution application for transmission or execution until the decree is returned with a certificate of non-satisfaction. In this case only the copy of the decree was returned without the certificate.

Held, that the Court which passed the decree is competent to entertain an application and transfer the decree to a third Court for execution.

A I.R. 1928 Mad. 493; I.L.R. 5 Rang. 397 and A.I.R. 1935 Lah. 465, followed.

63 M.L.J. 788 and I.L.R. 39 Mad. 640, distinguished.

But the application dated 20th January, 1930, cannot serve as a step in aid as there was no 'final order' passed on it. Final order need not be an order on the merits or a judicial determination of the matter involved in the application. But 'final order' implies that the proceeding has terminated so far as the Court passing the order is concerned. It cannot mean the last order in point of time irrespective of whether it terminates the proceeding or not.

N R C

Therefore an order granting further time for remedying certain defects does not terminate the proceeding and when the application is not represented, it cannot serve as a step-in-aid.

(1937) 1 M.L.J. 463, followed.

The Advocate-General (Sir A. Krishnaswami Aiyar), A. Satyanarayana and *K. Bashyam Aiyangar* for Appellant.

K. Subramaniam for Respondent.

S.V.V.

King, J. Crl. R. C. No. 746 of 1936.

12th August, 1937.

Madras Local Boards Act (XIV of 1920, as amended by Act XI of 1930), Ss. 193 and 627—Licence for working a rice mill—Renewal of licence refused—Mill continuing to work without licence—Conviction under S. 627—Conviction bad in law.

Before the Local Boards Act was amended, the Taluk Board, Vellore, had issued a notification under S. 193 of the Madras Local Boards Act notifying that among other places in the village '*V*' licence should be obtained before working a rice mill. One '*M*' obtained a licence in 1934 from the President of the Union Board of village '*V*'. The licence was renewed in 1935 but in 1936 the renewal of the licence was refused. And the rice mill continued to be worked without the licence. '*M*' was charged for an offence under S. 627 of the Madras Local Boards Act. He was convicted and fined by both the lower Courts.

Held, that in so far as after the amendment of 1930, the Village Panchayat Board of village '*V*' did not issue a fresh notification under S. 193 of the Madras Local Boards Act, '*M*' was not required to obtain any licence and therefore his conviction was bad in law. The transitory provision did not affect the question.

K. Bhashyam and *T. R. Srinivasan* for Petitioner.

The Public Prosecutor for the Crown.

A. C. Sampath Aiyangar for Complainant.

K. C.

Pandrang Row and Venkataramana Rao, JJ. Appeal Nos. 449 and 450 of 1931.

13th August, 1937.

Provincial Insolvency Act, S. 78 (2)—Exclusion of period for limitation—If period between the petition and annulment or adjudication order and the annulment.

The pronote sued on was executed on 8th January, 1920. A creditor of the executant filed a petition to adjudicate him insolvent on 7th November, 1922 and he was adjudicated insolvent on 21st

March, 1923. The adjudication was annulled on 5th April, 1928, and this suit on the pronote was filed on 23rd October, 1930, and to escape the bar of limitation, the plaintiff claimed that he was entitled to deduct the period from the date of the petition (I. P.) to the date of annulment under S. 78 (2).

Held, that under S. 78 (2) a creditor is entitled to deduct only the period from date of *adjudication* to the date of *annulment*. To apply the doctrine of relation back to a suit instituted before an order of adjudication is against the plain language of S. 28 (2). A suit can be filed without leave by a creditor before adjudication and the Court before which it is filed has jurisdiction to entertain it and pass a decree thereon. While so it is difficult to understand how an order passed *ex post facto* by another Court could render such a suit incompetent and a decree passed therein void.

I.L.R. 58 Mad. 1032, not followed.

A.I.R. 1933 Rang. 75, distinguished as *obiter*.

B. Sitarama Rao and *C. V. Subramania Aiyar* for Appellant.

B. Somayya and *Kasturi Seshagiri Rao* for Respondent.

S. V. V.

Varadachariar, J. C. R. P. No. 1314 of 1936.

13th August, 1937.

Contract—Bailment—Contract Act, S. 149—Goods left in a room in defendant's house, but key of the room with plaintiff—If constitutes bailment and delivery.

The plaintiff arranged that certain jewels which she desired to be made should be got made by certain goldsmiths working in the defendant's house, because there was more convenient accommodation there. The plaintiff used to attend every day at the defendant's house during the time that the goldsmiths were at work. The defendant at the outset received two old jewels from the plaintiff for being melted into gold and being utilised for the making of the new jewels. That was melted and the gold delivered to the plaintiff. Every evening as soon as the goldsmiths' work for the day was over, the plaintiff used to receive the half-made jewel from the goldsmith, put them into a box which the defendant had given her for her use and put the box in a room in the defendant's house. The plaintiff had the key of the room with her. While there the jewels were lost,

Held, that the defendant cannot be regarded as a bailee in respect of the gold or the half-finished jewels. From the fact that in the first instance the old jewels were handed over to the defendant, the bailment thereby constituted does not continue for all time. But the gold was returned and afterwards the jewel came back to her possession every day.

The mere leaving of the box in a room in the defendant's house when the plaintiff herself took away the key of the room cannot be said to amount to delivery within the meaning of S. 149 of Contract Act.

V. Visvanatha Sastri for Petitioner.

N. S. Mani for *K. V. Sesha Aiyangar* for Respondent.

S. V. V.

Venkataramana Rao, J. S. A. No. 1313 of 1932.
13th August, 1937.

Court-Fees Act (VII of 1870)—Suit by sub-mortgagee—Original mortgagee also impleaded—Court-fee, if payable on amount due to sub-mortgagee or on the amount due under the original mortgage.

When a sub-mortgagee sues for sale of the property mortgaged to his mortgagor, that is, the original mortgagee, impleading the original mortgagor as a party thereto, the court-fee must be paid on the amount due and payable in respect of the original mortgage and not merely on the amount due to the sub-mortgagee. Ordinarily a sub-mortgagee's right, just like any other mortgagee is to enforce his mortgage and bring to sale the property mortgaged to him, that is, the interest of the mortgagee in the property mortgaged to the latter. But the law permits him to enforce sale of the said property under circumstances and conditions which would entitle the original mortgagee to bring the property to sale. To such a suit the original mortgagor should be made a party. When a mortgagee effects a mortgage of his mortgage interest he is creating a transfer of his right as mortgagee though not absolutely. Therefore when a sub-mortgagee sues for sale of the property he is enforcing the right of the original mortgagee. The amount claimed by him is the amount due under the said mortgage though as sub-mortgagee he is only entitled to a portion of the said amount. A decree is passed on the basis of the original mortgage and the principal, interest and costs payable are calculated as if a suit was instituted by the original mortgagee and on payment into Court of the said sum so declared due to the original mortgagee, the sub-mortgagee is at liberty to apply for the payment of the amount due to him. When he is asking for the sale of the property the amount claimed by him is, as assignee of his mortgagor, the amount due to the latter and it is only after getting a decree for the same, he gets a subsidiary relief for the payment of the amount due to him.

S. Narasimha Aiyangar for Appellant.

M. S. Venkatarama Aiyar for Respondent.

S. V. V.

Venkatasubba Rao and Newsam, JJ. A. S. No. 314 of 1931.
12th August, 1937.

Madras Hindu Religious Endowments Act (II of 1927), S. 73 —Powers of the Court to frame scheme.

Under S. 73 of the Madras Hindu Religious Endowments Act the Court has no jurisdiction to frame a scheme. It can only appoint or remove a trustee or do such of the other acts as are mentioned in the section.

V. Radhakrishna Ayya and *S. V. Venugopalachari* for Appellant.

K. Rajah Aiyar and *S. Narasinga Rao* for Respondent.

K. C.

Burn and Abdur Rahman, JJ. S. A. No. 343 of 1933.
19th August, 1937.

Mahomedan Law—Sunnis—Deed of dower—No time specified therein as to when the dower was payable—Prompt or deferred —Presumption of law.

A Mahomedan wife brought a suit against her husband for recovery of Rs. 2,000 as dower specified in the deed of dower executed by him. The parties were both Hanafis. The deed was silent as to the time when it was payable. Venkataramana Rao, J., referred the case to a Bench for decision as there was a conflict in case-law in other Presidencies and it was also doubtful if I.L.R. 23 Mad. 371 laid down the law only for Shiahs as understood by Allahabad and Patna High Courts.

Held, that I. L. R. 23 Mad. 371 intended to lay down the law for all Mahomedans whether Shiahs or Sunnis, that the statement reported to have been made by counsel therein that the parties were Shiahs was a mistake, and that so far as this presidency is concerned there is no reason why the rule laid down in I.L.R. 23 Mad. 371, which is both workable and equitable should be disturbed after so many years. Even the Privy Council in 19 W.R. 315, though a case of Shiahs, intended to lay it down as law for Sunnis also.

Case-law discussed. Original texts examined.

K. Rajah Aiyar and *U. S. Ramaswami Aiyar* for Appellant.

S. Panchapakesa Sastri and *K. R. Krishnaswami* for Respondent.

S. V. V.

Varadachariar, J. C. R. P. No. 369 of 1936.
20th August, 1937.

Civil Procedure Code (V of 1908), Ss. 38, 142, O. 21, r. 10—Decree transferred for execution as immovables situate therein—Transferee Court if can execute against person—No limitation in transfer order—Powers of transferee Court.

A decree was passed by the Small Cause Court, Trichinopoly. As one of the defendants had immovable property within the Munsiff's jurisdiction, the decree was transferred to him and as a result of the proceedings taken there, some of the immovable properties were sold and part of the decree amount realised in 1930. On 7th August, 1933, an application to arrest the second defendant was made to the District Munsiff. By that date no report was sent by the District Munsiff to the Small Cause Court so as to deprive the District Munsiff of power to execute the decree any longer. But the petition was returned saying " No legal representatives can be added here. Application may be made to Small Cause Court", as by that time the first defendant was dead. But as execution was sought only against the second defendant, the plaintiff pressed the petition but yet the District Munsiff returned it.

Held, that reading S. 38, O. 21, r. 10 and S. 42 of Civil Procedure Code, their effect is that unless in the order of transfer there is any express limitation of the purpose for which the transfer is made, assuming such limitation can control the provisions of the Code as to jurisdiction. There is no reason to limit the powers of the Court to which the decree is transferred for execution. Merely because decree was transferred with a view to proceed against the immovables, it does not follow that the Court cannot execute by arrest. If anything, I.L.R. 39 Mad. 640 seems to take away the Original Court's power.

63 M.L.J. 788, referred.

Even in a case falling under S. 39, cl. (*a*), (*b*) or (*c*) there is no limit on powers of the transferee Court.

A.I.R. 1936 Cal. 521, not followed.

T. A. Anantha Aiyar for Petitioner.

V. S. Rangachari for Respondent.

S. V. V.

Varadachariar, J. C. R. P. No. 455 of 1936.

20th August, 1937.

Mortgage—Some properties sold in Revenue sale—Mortgagee filing suit for money and not a mortgage suit—If suit maintainable.

Where a plaintiff sued for money due on a mortgage but limited his claim to a money decree on the personal covenant stating that as the mortgage properties (some) had been sold away in a Revenue sale by reason of the mortgagor's default, he did not wish to take proceedings to enforce the security and was content with a money decree, the suit is maintainable. If it be under S. 68 (*c*) of the Transfer of Property Act he has an unconditional right to sue for money, but even taking it that the case falls under either cl. (*a*) or cl. (*b*) of S. 68 the Court has no power to insist upon his filing a mortgage suit even when he does not wish to prefer one.

D. Ramaswami Aiyangar for Petitioner.
V. S. Krishnaswamy Aiyar for Respondent.
S.V.V.

Gentle, J.
23rd August, 1937.

Application No. 819 of 1937
in
T. O. S. No. 16 of 1931.

Court-fees—Application for letters of administration with will annexed—Order for grant of letters of administration—Applicant being pauper—Issue of letters in forma pauperis—*Permissibility—Civil Procedure Code (V of 1908), S. 4 (1) and O. 33, r. 8—Continuance of proceeding as pauper—Court-Fees Act (VII of 1870), S. 19-I and Sch. I, Art. 11.*

A legatee applied for the grant of letters of administration with the will annexed, paying the requisite court-fee on the application as provided in the Madras High Court-Fees Rules, and subsequently on a caveat being entered it was numbered as a suit and ultimately after contest an order was made for the grant of letters of administration. The legatee then applied for the issue of the same *in forma pauperis* on the ground that he was a pauper and unable to pay the court-fee prescribed by Art. 11 of Sch. I of the Court-Fees Act.

Held, on a reference by the Master, that the provisions of O. 33, Civil Procedure Code, were applicable to proceedings for the grant of probate or letters of administration, that the issue of probate or letters of administration was a proceeding connected with the petition or suit within the meaning of r. 8 of O. 33, and that O. 2, r. 2 of the Madras High Court Original Side Fees Rules exempting a pauper from paying the fees should be read in addition to the provisions of O. 33, r. 8.

I.L.R. 18 Bom. 237 and unreported judgment of Venkatasubba Rao, J., in Application No. 2925 of 1930, relied on.

Held also, that the mandatory provisions of S. 19-I of the Court-Fees Act regarding payment of court-fees for the grant of letters of administration were subject to the provisions of O. 33, r. 8, Civil Procedure Code, which is a specific provision taking effect notwithstanding the provision of S. 4 (1) of the Code.

Held further, that the applicant could continue the application as a pauper notwithstanding the payment of court-fee by him up to that stage. The fact that he had paid court-fee on the original application did not disentitle him from pleading his pauperism.

I.L.R. 53 Mad. 43: 57 M.L.J. 677; 64 M.L.J. 728 and I.L.R. 20 Cal. 319, referred to.

T. S. Venkatesa Aiyar and *C. S. Varadachari* for Applicant.

R. Ramamurthi Aiyar for the Advocate-General (*Sir Alladi*

Krishnaswami Aiyar) instructed by the Government Solicitor for the Government.

B.V.V.

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Chief Justice and Varadachariar, J.

O. S. A. No. 52 of 1937.

24th August, 1937.

Costs—Companies Act—Petition for winding up by a creditor—Petition withdrawn—Some creditor respondents appearing by counsel and supporting petition—If entitled to costs of petition.

In November, 1936, a resolution for voluntary winding up of the company was passed. On 11th December, 1936, the appellant asked for an order for winding up under the supervision of the Court. But when the petition came on before Gentle, J., on 27th April, 1937, the petitioner stated that he did not propose to pursue the winding up petition. The learned Judge then enquired if any other creditor would proceed with the petition. Six creditors had entered appearances and professed to support the petition for winding up. But no creditor was willing to go on with the petition. Thereupon the Judge dismissed the petition and directed that the petitioner should pay the costs of all parties appearing before him, that is, seven sets of costs. On an appeal against this order for costs,

Held, that the voluntary liquidator would have been entitled to his costs because he had successfully opposed the petition but as on 27th April, he had stated that he would not press his costs, he did not ask for it.

As for the creditors respondents,

Held, that (Form 9 of O. S. Rules) (Rules under Companies Act) only refers to the appearance of persons who desire to oppose the winding up order and differs materially from the form prescribed by the English Rules which allow interested parties to appear to oppose or to support. R. 101 has not the effect of applying this rule in Madras. The creditors here appeared to support and not to oppose the petition and the petition having failed they are not entitled to costs in their favour. They supported a petition which the Court dismissed. In England it appears to be usual to allow one set of costs to the successful party and where the petition is withdrawn one set even to the supporting creditors but that does not apply here. There was also no justification here for the separate appearance of the respondent creditors.

10 Ch. D. 130, relied on.

K. Krishnaswami Aiyangar and *Mahomed Asker Ali* for Appellant.

W. A. P. Lobo, S. S. Rajagopalan, T. K. Rajagopalan, Kasturi Ranga Aiyangar and *K. M. Balasubramanian* for Respondents.

S. V. V.

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Wadsworth, J.
9th August, 1937.

Petition No. 417 of 1936
and
Application No. 246 of 1937.

Contempt—Insolvent's agent refusing to vacate premises found to belong to insolvent, setting up a claim in himself—Insolvent committed for contempt—If agent can be committed for contempt.

An insolvent sold a house to the applicant. After sale there was considerable trouble in getting the insolvent to quit the premises. After the purchaser got into possession of the upper storey, the vendor was continuing in the lower storey with his family. Contempt proceedings were taken against the insolvent who contended that the occupants of the lower storey were not under his power, that his wife was out of his control, etc. That contention was negatived and he was committed for contempt. But his wife continued to remain on the premises. This application was taken to commit her for contempt as the presumed agent of the insolvent. The Court held that the wife was acting under the instigation of the insolvent though she denied it.

But held that there was no provision by which the Insolvency Court can evict the wife, the presumed agent of the insolvent by taking contempt proceedings against her. S. 58, sub-S. (5) is in terms restricted to a refusal of an agent to hand over money and securities belonging to the insolvent. That cannot cover the persistence by an agent of the insolvent in obstructing the delivery of immovable property.

A. S. Natarajan for Respondent.

S. V. V.

Burn and Lakshmana Rao, JJ.
26th August, 1937.

C. M.A. No. 199 of 1936.

Civil Procedure Code (V of 1908), O. 21, r. 66 (2)—Sale proclamation, drawing of without notice to the judgment-debtor—If an illegality or only an irregularity.

Mere omission to give notice to the judgment-debtor under O. 21, r. 66 (2) before drawing up the terms of the proclamation of sale is not an illegality rendering the sale void. It is nothing more than an irregularity.

K. Rajah Aiyar and *P. S. Narayanaswami Aiyar* for Appellant.

T. L. Venkatarama Aiyar and *M. Patanjali Sastri* for Respondent.

S. V. V.
N R C

The Chief Justice and Varada-chariar, J. C. R. P. No. 945 of 1936.
30th August, 1937.

Stamp Act, S. 35—Insufficiently stamped promissory note—If admissible as acknowledgment of a prior note.

A promissory note dated 5th June, 1932, ran as follows:—"On account of my necessity this day......that is, the amount due for principal and interest on the pronote executed and delivered on 23rd June, 1929, is Rs. 93-3-0; the amount due on the pronote executed and delivered on 6th July, 1929, is Rs. 92-13-0 and the amount due......on the pronote executed and delivered on 14th February, 1931, is Rs. 101. The total is Rs. 287. On demand I promise to pay you or order in one lump sum the principal together with interest thereon at Rs. 1-9-0 per cent. per mensem.. ....." On an one anna stamp the executant's signature was written. In a suit on the note, it was contended that the portion of the note which recited the previous promissory notes was admissible as an acknowledgment of the earlier notes.

Held, that S. 35, Stamp Act, says that the note shall not be admitted in evidence for *any* purpose, nor shall it be acted upon, unless it bears the stamp prescribed by law. The section means that it cannot be admitted under any circumstances in a civil suit.

Passage contra in Mulla's Stamp Act (3rd edn.) at page 122, disapproved.

32 L.W. 691; A.I.R. 1930 Mad. 485 and A.I.R. 1933 Mad. 251, not approved.

(1937) 1 M.L.J. 163, relied on.

V. Viyyanna for Petitioner.

Respondent unrepresented.

S.V.V.

The Chief Justice and Varada-chariar, J. C. C. C. A. Nos. 45 to 51 of 1935.
31st August, 1937.

Deed of composition—Trustee under the deed—Majority of creditors signing the deed and accepting composition—Trustee paying them all—Balance—Trustee appropriating to his own debt—Prior to appropriation one creditor signifying assent to deed—If trustee can pay balance to himself without paying such creditor—Breach of trust.

One *G.V.*, who was a merchant carrying on business in Madras, became financially involved and by July, 1930, he owed over Rs. 88,000. There were 26 creditors, 14 in Madras and 12 in Mysore. At a meeting of the Madras creditors it was agreed that they should accept a composition of 4 annas in the rupee and a

deed was executed in favour of *B* as trustee for the creditors. *B* was himself a creditor for Rs. 15,000. The Madras creditors in due course signed the deed but the Mysore creditors were not so ready to accept it. They were aware of this proposal by October, 1930, but only two agreed to it and the Madras creditors received the amounts due to them at 4 annas rateable. V. S. and Sons (the appellant) signified his acceptance of the deed by letter dated 24th December, 1930. By that time the Madras creditors and two Mysore creditors, apart from *B*, had all been paid and *B* had in his hands Rs. 3,804-4-6 which was sufficient to pay him at 0-3-9 on the amount due to him. By the time he allocated this (in November, 1931) to his debt, he had notice of appellant's acceptance. Thereupon suits were filed by the appellant and the other creditors who had not signified acceptance against the debtor and the trustee *B*.

Held, that *B* was a trustee in respect of the sum that he received from *G.V.* to be paid to creditors. There was no breach of trust on *B's* part in making the payments to the Madras creditors and the two Mysore creditors. These payments were all made before the appellant or the plaintiffs in the other suits had signified their acceptance. The acceptance need not necessarily be by signing the deed. It may be by other means.

Field v. *Lord Donoughmore*, 1 D.R. & War. 168 and *Biron* v. *Mount*, 24 Beav. 642, followed.

But in so far as *B* paid himself Rs. 3,804-4-6 after he had notice of the appellant's acceptance, he was guilty of a breach of trust. His duty was as a trustee to share that balance rateably with him. So far as creditors who had not signified their assent before *B* distributed the moneys and paid himself are concerned, they cannot claim from him.

V. Radhakrishnayya and *L. Krishna Das* for Appellants.

B. Somayya and *Shross Balakrishna Rao* for Respondents.

S.V.V.

Abdur Rahman, J. C. R. P. No. 986 of 1935.
1st September, 1937.

Civil Procedure Code, O. 33, r. 9—Unregistered deed with regard to subject-matter of suit—If enough to dispauper—Policy of the rule.

A pauper plaintiff entered into an agreement with a third person whereby in consideration of certain sum received from the third person he agreed to pay the sum with interest and if there was default he agreed to give one-fourth of the suit properties. At the instance of the defendant the plaintiff was dispaupered under O. 33, r. 9, C. P. Code.

In revision it was contended that the agreement in so far as it was not registered did not create any interest in the subject-matter of the suit and O. 33, r. 9 contemplates the valid creation of interest in the subject-matter of the suit.

Held, that the language of O. 33, r. 9, Civil Procedure Code, ought to be given effect to as it stands and the plaintiff was rightly dispaupered.

Held, further, that O. 33 has been designed in aid of *bona fide* litigants and it must be strictly confined to such litigants.

A.I.R. 1927 Pat. 352, followed.

T. S. Venkatesa Aiyar for Petitioner.

T. R. Srinivasan for Respondent.

S. V. V.

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Varadachariar and Burn, JJ.
3rd September, 1937.

Appeal No. 356 of 1930 and C. R. P. No. 1426 of 1930.

Hindu Religious Endowments Act, S. 9 (2)—Public—Meaning of.

According to the definition in S. 9 (2), the user by the public for the purpose of religious worship has to be proved as a fact. The question of intention to dedicate the place for the use of the public or the user by the public being as of right is necessarily a matter for inference from the nature of the institution and the nature of the user and the way the institution has been administered. Once a fairly long course of user by the public for the purpose of worship is established and the fact of a separate endowment in trust for the deity is also proved it is a fair inference unless the contrary is established particularly when the character of the temple, its construction, the arrangement of the various parts of the temple and the nature of the deities installed there are similar to what obtains in admittedly public temples that the institution must have been dedicated for user by the public. Similarly when user by the public generally to the extent to which there is a worshipping public in the locality is established it is not unreasonable to presume that the user was of right unless there are circumstances clearly suggesting that the user must have been permissive or that the authorities in charge of the temple have exercised such arbitrary power of exclusion that can only be ascribed to the private character of the institution.

K. P. Ramakrishna Aiyar and *Hrishikesan Nambudripad* for Appellant-Petitioner.

K. Subba Rao for Respondent in both.

S. V. V.

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The Chief Justice and Varada-chariar, J.
1st September, 1937.

C. C. C. A. No. 52 of 1935.

Mahomedan Law—Marriage of wife's sister when wife alive—Child of such marriage—If legitimate.

A child of a marriage contracted by a Mahomedan with his wife's sister, the wife being alive, is legitimate.

I.L.R. 23 Cal. 130, dissented from.

I.L.R. 41 Bom. 485 has support of all the principal modern works on Mahomedan Law. The marriage is not void but though invalid during subsistence of the prior marriage would become lawful on the divorce or death of the wife. The bar of unlawful conjunction renders the marriage irregular and not void. If a Mahomedan marries a person contrary to law and it is not possible in any set of circumstances for that union to become regular the issue would not be legitimate. The present case is one where the marriage was against the law when it was contracted but it was capable of becoming a valid marriage and therefore was valid so far as issues were concerned.

C. Sarangarajan for Appellant.

A. B. Nambiar and *Raffiuddin Ahmad* for Respondent.

S.V.V.

Varadachariar and King, JJ.
15th September, 1937.

Appeal No. 217 of 1932
and
C. R. P. No. 1306 of 1932.

Hindu Religious Endowment—Temple—Originally private—Admission of public later on—If necessarily makes it a public temple.

If at the inception, a temple was a private temple dedicated for the use of the founder's family and was a private trust, the fact of the admission of the public to the temple later on would not of itself necessarily affect the private character of the trust.

I.L.R. 58 Mad. 104, followed.

G. Lakshmanna and *G. Chandrasekara Sastri* for Appellant-Petitioner.

P. V. Rajamannar for Respondent.

S.V.V.

N R C

The Chief Justice and Madhavan Nair, J. A. S. No. 61 of 1932.

15th September, 1937.

Hindu Law—Family members trustees for several years—Sufficient proof of hereditary trusteeship.

Where the members of the plaintiff's family have been trustees of a temple for over 75 years and the office descended in the plaintiff's family for four generations without any evidence that the office was held by any other family.

Held, that the evidence was sufficient to prove the hereditary right of the office of trustee in the plaintiffs' family.

12 M.I.A. 263 at 268; 10 M.I.A. 19; I.L.R. 36 Mad. 364 and I.L.R. 10 Mad. 292. referred to and followed.

I.L.R. 7 Mad. 499, distinguished.

B. V. Ramanarasu for Appellants.

P. V. Rajamannar and *K. Subba Rao* for Respondents.

S. V. V.

Pandrang Row and Venkataramana Rao, JJ. Appeal No. 182 of 1936.

22nd September, 1937.

Will—Executor—Not accepting office—Heir-at-law—If can maintain suit for properties under the will not given to him.

A Hindu testator died leaving a will executed in the moffusil bequeathing some of his properties (all situated outside the Presidency Town of Madras) to his widow and others to other persons and some charities and appointed two persons as executors. The executors did not accept office. The widow of the testator brought a suit for recovery of possession of the *entire* estate of her husband from the defendants who were alleged to be trespassers and impleaded the surviving executor also as one of the defendants. The contention of the defendants in possession was that as the widow had not obtained letters of administration with the will annexed, she was not entitled to sue, as legal owner of the properties, except for such of the properties as were specifically bequeathed to her.

Held, that both under English law and under Indian law also after the Probate and Administration Act of 1881 where the executors had not accepted office, the estate of the testator must be deemed in law to have vested in the heir-at-law only and she can maintain an action for trespass and recover the whole estate.

(1898) 2 Ch. 573; (1914) 2 Ch. 504 and (1937) A. C. 626, followed.

I.L.R. 46 Mad. 190 and I.L.R. 59 Cal. 911, referred to.

T. M. Krishnaswami Iyer and *S. Panchapakesa Sastri* for Appellants.

P. S. Narayanaswami Iyer for Respondent.

S. V. V.

Horwill, J. S. A. No. 35 of 1936.
6th September, 1937.

Hindu Law—Hindu temple—Archaka—Practice of his taking Hundi collections—If opposed to public policy.

The practice that the archaka in a temple should take the whole of the Hundi collections for his own maintenance expenses and for the expenses of the pooja is not opposed to public policy nor illegal.

I.L.R. 40 Mad. 212, distinguished.

68 M.L.J. 295, relied on.

B. Somayya for Appellant.

C. S. Venkatachariar and *D. Ramaswamy Aiyangar* for Respondents.

S.V.V.

Burn and Lakshmanarao, JJ. C. M. A. No. 119 of 1936.
17th September, 1937.

Provincial Insolvency Act (V of 1920), Ss. 33, 63, 64 and 74—Summary administration—Framing of Schedule by Receiver—Validity—Final dividend—Notice under S. 64 necessary—Right of creditor to prove his debt.

A debtor was adjudicated an insolvent in 1928 and the Court directed that the estate be administered summarily under S. 74 of the Provincial Insolvency Act. In 1935 an asset worth over Rs. 500 was secured by a cancellation of a conveyance by the insolvent. The Receiver framed a schedule after notice during summary administration and obtained the sanction of the Court. A creditor who did not prove his debt previously applied to prove his debt under S. 33 and Proviso to S. 74 of the Act. The lower Court held that though summary administration was adopted by the Receiver, S. 63 of the Provincial Insolvency Act barred the applicant as he had failed to prove his debt.

Held, that the Receiver had no authority to frame a schedule as it was the duty of Court under cl. (iii) of S. 74 to distribute the assets among the creditors, and that as the dividend was the final dividend, notice prescribed under S. 64 of the Act was necessary.

Held also, that the creditor was not barred by any provision of the Insolvency law from proving his claim.

I.L.R. 55 Bom. 200, distinguished.

A. Lakshmayya for Appellant.

P. Somasundaram for Respondent.

B. V. V.

NRC

Newsam, J. Crl. R. C. No. 108 of 1937
24th September, 1937.

Madras Gaming Act (III of 1930), S. 12—Playing at Cards on a tank bed—If an offence.

Gambling is not a criminal offence in itself. Gambling in a public place, street or thoroughfare is an offence. Where the petitioner and others were caught playing cards for money in a tank bed, they cannot be convicted of gambling in a public place.

I.L.R. 30 Bom. 348, followed.

'Place' in S. 12 of the Madras Gaming Act means from its context a place akin to a street or thoroughfare used regularly and necessarily by people going from one place to another. The real offence dealt with in S. 12 is obstruction or annoyance to wayfarers and pedestrians.

V. T. Rangaswamy Aiyangar and *K. Ramaswami Aiyangar* for Petitioner.

The Public Prosecutor on behalf of the Crown.

S.V.V.

Newsam, J. Crl. R. C. No. 228 of 1937.
27th September, 1937.

Criminal Procedure Code (V of 1898), Ss. 110, 117 (4) and 117 (5)—Scope and purpose of—Proof of fact that a person is a habitual offender or desperate or dangerous person—Joint inquiry of persons not associated in all the matters under inquiry whether just or legal.

Two persons were required by an order of a first class Magistrate under S. 112, Criminal Procedure Code, to show cause why they should not be directed to execute bonds with sureties to be of good behaviour, under S. 110, cls. (*a*), (*d*), (*e*) and (*f*) of the Criminal Procedure Code on information given to the Magistrate by the Police containing several charges some of which related to one or the other of the counter-petitioners alone. In respect of both there was the general charge in the preliminary order that they were so desperate and dangerous as to render their being at large without security hazardous to the community. Revision Petition was filed in the High Court to quash the proceedings before the Magistrate on the grounds that the joint inquiry of the two persons was not legal, and that S. 110 was not to be used against the counter-petitioners on allegations like those made against them in respect of any of which neither of them had ever been convicted of any crime.

Held, that since the two counter-petitioners were not associated together in all the matters under inquiry, it was not only not just but also not legal to deal with them both in the same inquiry and further that when one charge is that two persons were so desperate and dangerous as to render their being at large without security hazardous to the community, there can be no intimate connection between two individuals in regard to their characters as to render them liable for a joint inquisition.

I.L.R. 45 All. 109; 47 M.L.J. 689; and I.L.R. 27 Cal. 781, referred to.

Held further, that S. 110 was intended to deal with ex-convicts or habitual criminals and dangerous and desperate outlaws who were so hardened and incorrigible that the ordinary provisions of the penal law and the normal fear of condign punishments for crime were not sufficient deterrents or adequate safeguards for the public. The section was not obviously intended for use against merely undisciplined people such as local bosses and faction leaders on allegations such as that they were tyrannical and high-handed self-appointed village dictators, that they fined poor people who disobeyed them, punished labouring men for alleged disrespect to them, forced people to put themselves in their power by executing pronotes in their favour and even gratuitously interfered in marriages between their parties. The general rule of law was that every man was presumed not to be a criminal or an offender until he had been found guilty by a competent Court. Regarding S. 117 (4), Criminal Procedure Code, conviction by public opinion should only be permitted to take the place of conviction by Court in rare and exceptional circumstances.

K. S. Jayarama Aiyar, K. Venkataramani and *R. Sundaralingam* for the Petitioners.

T. S. Anantharaman for the Crown.

K. C.

Madhavan Nair and King, JJ. A. S. No. 548 of 1931.

29th September, 1937.

Hindu Law—Joint family—Acquisitions by one member in his name—Small nucleus—Onus of proving that acquisitions were all joint—Nature of nucleus.

One *Va* had an elder brother *Ve*. They were members of an undivided Mitakshara Hindu family. *Va* was in Government service on a salary of Rs. 60 per mensem for about 15 years. In 1875 the brothers partitioned. About Rs. 2,630 came then into *Va's* hands. After their mother's death, he got a sum of Rs. 500 being his share of the money left with her at the partition. This

Rs. 500 came to him long after the acquisition of the suit properties. Rs. 2,000 of the Rs. 2,630 was lent out on mortgage and that was discharged. There was no evidence to show whether any portion of this money was utilised by *Va* in buying the suit properties. If *Va* had no personal income or if the private property were acquired more or less at the time when this money was got back, it may be said that family nucleus has been used to stamp this as joint family property. But these properties were acquired from time to time during various years—1884 a sale for Rs. 9,000, 1885 a house for Rs. 2,000, 1895 another for Rs. 2,750, etc. In 1892 he was worth about Rs. 20,000. There was no evidence that any portion of the ancestral property which he had with him went towards the purchase of any of these properties. Admittedly he did not keep any separate accounts of the income from the ancestral property or of his own private income.

Held, that it is only when a person alleging that the property is ancestral proves that there was a nucleus by means of which other property may have been acquired that the burden is shifted on to the party pleading self-acquisition to prove that the property was acquired without any aid from the family estate. That is, it is only after it is shown that the family was possessed of some property with the aid of which the property in question could have been acquired, that the onus shifts to the party alleging self-acquisition to affirmatively make out that the property was acquired without any aid from the joint family estate. Having regard to the cases, the mere proof by the defendant that his grandfather *Va* had with him ancestral property of Rs. 2,630 will not by itself shift the burden of proof to the plaintiff of proving that the subsequent acquired properties were acquired with his private earnings. The defendant, to shift the burden on to the plaintiff, will also have to prove that the ancestral property was such that by its means his grandfather may have acquired the subsequently acquired properties. In the light of the decisions the presumption is against blending.

A.I.R. 1928 Lah. 397; A.I.R. 1935 All. 67; 1937 M.W.N. 835; (1937) 1 M.L.J. 364 and 45 L.W. 442, followed.

17 M.L.J. 184; I.L.R. 33 All. 677 and I.L.R. 46 Mad. 373, distinguished.

Case-law discussed.

T. M. Krishnaswami Aiyar and *P. S. Ramachandra Aiyar* for Appellant.

P. S. Narayanaswami Aiyar for Respondent.

S. V. V.

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The Chief Justice. C. R. P. No. 1416 of 1935.
24th September, 1937.

Award—Arbitration—Private reference—Registration Act (as amended in 1929), S. 17 (1) (b)*—If requires registration.*

A suit was filed for the filing of an award passed by an arbitrator on a private reference under paragraph 20 of Schedule II of the Civil Procedure Code and for the passing of a decree in terms thereof. The properties dealt with under the award were of the value of more than one hundred rupees. The question was whether the award required registration under the Amended Act.

Held, that the award in question required registration and not having been registered cannot be admitted or acted upon by the Court.

I.L.R. 62 Cal. 201 and I.L.R. 15 Pat. 579, followed.

K. Bashyam and *R. Kesava Aiyangar* for Petitioners.

K. Rajah Aiyar, A. S. Srinivasa Aiyar and *S. Seshadri* for Respondents.

S.V.V.

Sir M. Venkatasubba Rao and Appeal No. 135 of 1931.
Sir Abdur Rahman, JJ.
28th September, 1937.

Wakf—Mutavalli selling wakf property as private property—Adverse to trust—Presumption of title in case of long and quiet possession—Limitation Act (IX of 1908), Arts. 142 and 144—Applicability.

Possession of wakf property by an alienee from a mutavalli who purports to sell the same as a private owner of the properties and not as manager of the wakf is adverse to the trust from the date of alienation and possession thereunder as the same amounts to a negation of the trust.

A. S. No. 156 of 1926, followed.

I.L.R. 46 Mad. 751 (P.C.); I.L.R. 12 Pat. 251 (P.C.) and I.L.R. 59 Mad. 809 (P.C.), considered.

The presumption of a lawful origin of title in support of long and quiet possession can properly be drawn, even where an alienation of trust property is made without any recitals of necessity and there is a complete failure of actual evidence owing to lapse of time.

I.L.R. 57 Cal. 1293 (P.C.) and I.L.R. 46 Bom. 481 (P.C.), applied.

Art. 142 of the Limitation Act only governs cases where the plaintiff sues for recovery of possession on the ground of his title

and on the further allegation that the defendant was his tenant, and where the tenancy is found to be not proved during the trial. Art. 144 is not applicable to such cases.

21 L.W. 398, not followed.

Case-law discussed.

K. Rajah Aiyar and *S. Nagaraja Aiyar* for Appellants.

S. Panchapakesa Sastri, K. R. Krishnaswami Aiyar, K. S. Desikan, A. S. Viswanatha Aiyar and *S. Muthiah Mudaliar* for Respondents.

K. C.

The Chief Justice and Madhavan Nair, J. Appeal No. 38 of 1932.

30th September, 1937.

Hindu Law—Power to adopt given to a widow—Refusal to act thereon—Widow's rights to property whether affected.

On 19th February, 1921, *T* made a will. Therein he appointed three people as executors, named *S* as the person to be adopted, and in case *S's* father refused to give *S* in adoption some other boy was directed to be adopted. The will contained directions for maintenance of the adopted son and widow, for performance of funeral and annual ceremonies, for accumulation of the balance of income and finally for handing over of the estate to the boy to be adopted on his attaining majority. *T* died on 23rd February, 1921.

On 20th March, 1921, the executors created a deed of trust in favour of *S* giving out that *S* had been in fact adopted by *T* on 22nd February, 1921, that is, a day before his death. Thereupon the widow *V* filed a suit O. S. No. 405 of 1921 for a declaration that the alleged adoption was false, that the alleged will was not true and valid and asked for possession of the properties. *S* and the executors were made defendants. The High Court had held (1) that the adoption was false, that the will was true and valid; (2) that on a proper construction of the will the power to adopt was really given to the widow. Though the question of the widow's right to possession under the will was argued, no decision was given thereon and the High Court had decided that the widow was not entitled to possession on her claim as against the will and therefore dismissed the suit.

Thereafter the widow *V* filed a suit out of which the present appeal arises for possession of the properties and for accounts from the executors, on the ground that as nobody had been adopted and as she had decided not to adopt, the executors could not cling on to the properties but must hand them over to her. The executors

defended the suit but their objections were over-ruled and the Court granted *V* a decree for possession and accounts as prayed for.

One of the executors preferred an appeal to the High Court. It was contended that the decision of the High Court in the prior suit operated as *res judicata*, that the will created a trust in favour of the executors, that *S* took the estate as *persona designata* or a Universal Legatee and finally in any event, the widow was not entitled to possession for though she might now be resolved not to adopt she might change her mind and adopt any moment before her death.

Held, (1) that the previous suit did not operate as *res judicata*; (2) that the will did not create a trust in favour of the executors; (3) that *S* was not a Universal Legatee; (4) that though a direction might be given by a will to adopt, the widow was under no legal obligation to do so (I.L.R. 28 All. 377 and 7 M.I.A. 169); and (5) that her refusal to adopt would not deprive her of her rights to property (I.L.R. 7 Cal. 288 and 27 L.W. 370).

Per *Madhavan Nair, J.*—The widow was under no religious obligation to adopt. There are no texts on this point. She cannot be compelled to act upon it unless and until she chooses to do so. Her rights to property could not be affected by her refusal to adopt.

C. Narasimhachari and *M. E. Rajagopalachari* for Appellant.

P. N. Appuswami Aiyar for Respondent.

K.C.

Varadachariar and King, JJ. Appeal No. 114 of 1932.
7th October, 1937.

Hindu Law—Partition—Notice to become divided—If receipt of notice necessary—Will—Letter by a third party regarding the condition of testator on the day—If admissible in evidence.

A father, who was undivided with his son, wrote a letter to him on the 3rd August saying that he wanted to inform him that the jointness of their status is severed and that each may do as he pleases with his share, and sent it by registered post. The next day (4th) he executed a will. The letter was received by the son only on the 9th by which time the father had died.

Held, the will was valid. The authorities lay down generally that the communication of the intention to become divided to other partners is necessary, but none of them lays down that severance in status does not take place till such communication has been received by the other coparceners.

33 L.W. 384 lays down that even if it should be assumed that the date of receipt of the notice by the other coparceners is material the severance of status dates back to the date when communication was sent. The fact that the other coparceners have no choice or option in the matter clearly indicates that the date of the service of notice by them cannot be material. The issue of the notice is enough to prevent survivorship operating. The question as to what will be the position where a notice is posted in circumstances when it will be obviously impossible for it to reach the addressee left open, as then it may be argued that it is merely a device to defeat the law.

Though the condition of the deceased on the day of the alleged execution of the will is relevant, a letter containing a description of that condition purporting to have been written by a deceased person in a letter to a friend is not admissible in evidence either under S. 32 or under any other section of that Act.

Vedantam Satyanarayana for Appellants.

N. Rama Rao for the Respondents.

S. V. V.

Varadachariar and King, JJ. A. S. No. 308 of 1932.
7th October, 1937.

Onus—Hindu Law—Lender of money to a member of a joint family—Onus of proof of necessity—Borrower family in possession of materials bearing on this question—Non-production of—Effect.

The general rule is that a lender who seeks to make the other members of the borrower's family liable must prove that the money was borrowed or applied for family purposes. But in the application of this rule the defendants are not entitled to place undue reliance on this rule of onus if being in possession of materials which will throw light upon the utilisation of the borrowed money they do not care to place such materials before the Court.

I.L.R. 42 Mad. 629, relied on.

B. Manavala Chowdri for Appellant.

Ch. Raghava Rao for Respondent.

S. V. V.

Burn and Lakshmana Rao, JJ.
6th October, 1937.

C. M. As. Nos. 304 of 1934,
9 of 1935, 81 of 1935, 291 of 1935,
94 of 1934, 409 of 1935 and
C. R. P. No. 328 of 1935.

Decree—Not engrossed on non-judicial stamp paper—Decree final within meaning of S. 2 (15) of Stamp Act (II of 1899)—Decree whether governed by S. 36 of the Stamp Act—Subsequent engrossment on non-judicial stamp paper—Applicability of S. 37, Stamp Act—Nature of a partition final decree till engrossment on non-judicial stamp paper—Whether executable before proper engrossment.

The plaintiff filed a suit for partition impleading as a party to the suit a commission agent who had to account for large sums of money due to the family and prayed for the recovery of his share of the amount found due on a proper taking of the accounts and the lower Court passed a decree in favour of the plaintiff and the other sharers for the respective amounts due to each sharer on a proper rendering of the accounts. The executing Court refused to execute the decree on the ground that it was not engrossed on a non-judicial stamp paper.

Held, that the decree was a final order of a Civil Court for effecting a partition within the meaning of S. 2 (15) of the Stamp Act.

The fact that the decree was being acted upon and executed for over two years does not bring the matter within S. 36 of the Stamp Act as there is no question of the decree being "*admitted in evidence*" but it was only a question of executing it and thereby "*acting*" upon it, which is prohibited by S. 35 and not cured by S. 36.

The fact that the decree has been subsequently engrossed on a non-judicial stamp paper cannot validate the decree from the date on which it had been passed, nor can it validate the proceedings already taken in execution of such decree. S. 37 of the Stamp Act which validates retrospectively instruments engrossed on a stamp paper of sufficient amount but of improper description does not apply. S. 42 of the Stamp Act provides that when the duty leviable upon an unstamped or insufficiently stamped instrument has been paid, and the instrument has been endorsed, the instrument shall "*thereupon*" be admissible in evidence and may be acted upon, and is in terms not retrospective.

Held also, that a final decree for partition has no existence as a decree until it is engrossed on the proper non-judicial stamp paper and till that is done the suit is pending.

I.L.R. 32 Cal. 483, followed.

C. M. A. No. 82 of 1935 and C. R. P. No. 331 of 1935.
N.R.C.

The decree having been executed before the same was engrossed on non-judicial stamp paper, in spite of the objections of the judgment-debtors as to its non-executability, a third party became the Court auction-purchaser. Later on, at the instance of the judgment-debtors the executing Court reviewed the matter, held the decree not executable and refused to confirm the sale.

Held, that there being no decree in existence at the date of the sale, the sale proceedings were a nullity. The auction-purchaser who bought for value at the sale held by the Court *bona fide* and with no reason to suppose that there was anything lacking in the Court's power to sell cannot be protected. I.L R. 14 Cal. 18 and I.L.R. 25 Bom. 337, distinguished, as cases where the executing Court had jurisdiction to sell.

Held also, that an application by an auction-purchaser to confirm the sale-deed did not lie; and an order rejecting such an application was neither appealable nor revisable. Confirmation follows automatically under r. 92 (1) and setting aside the sale follows automatically under r. 92 (2) of O. 21, Civil Procedure Code.

V. Suryanarayana and *K. Kameswara Rao* for Appellants (Decree-holders and Auction-purchaser).

G. Lakshmanna, G. Chandrasekhara Sastri, B. Somayya and *M. S. Ramachandra Rao* for Respondents (Judgment-debtors).

K. C.

Horwill, J. S. A. No. 615 of 1936.
8th October, 1937.

Declaratory suit—Suit by assignee of a pro-note—Decree—Later suit by assignor for a declaration that the assignee had no right in respect of the decree—If maintainable.

The second defendant executed a promissory note in favour of the plaintiff who assigned the same to the first defendant. Subsequently the first defendant filed a suit against the second defendant and obtained a decree. The present suit was brought for a declaration that the first defendant had no right whatever in respect of the decree obtained by him against the second defendant and that it belonged exclusively to the plaintiff.

Held, that the relief as to declaration being in the discretion of Court, whatever might be the effect of the declaration the suit was maintainable.

68 M.L.J. 129, followed.

A. S. Srinivasa Aiyar and *S. Seshadri* for Appellant.

R. Sundaralingam for Respondent.

S. V. V.

The Chief Justice and Madhavan Nair, J.
12th October, 1937.

Cr. M. P. No. 1084 of 1937.

Contempt of Court—Pending case—Newspaper article tending to create prejudice—Intention of publisher and writer if material.

Where the editor of a newspaper published an article which stated with reference to a pending suit that the defendants' case was true, that the plaintiff who was a zamindar had used his influence maliciously and procured convictions of the defendants in criminal cases and added that the conduct of the plaintiff was intended to ruin the defendants who were poor zamin ryots, and the writer and publisher were proceeded against for contempt,

Held, that the article tended to excite prejudice as against the party to the litigation and consequently amounted to contempt of Court. In such a case neither the circumstance that the trial Judge was not likely to get prejudiced on account of the article nor the absence of intention on part of the writer or publisher to prejudice the trial of the suit is material in deciding the question of contempt of Court.

The St. James's Evening Post case, (1742) 2 Atk. 469: 26 E.R. 683; *Littler* v. *Thomson,* (1839) 2 Beav. 129: 48 E.R. 1129; *The William Thomas Shipping Co.,* In re, (1930) 2 Ch. 368 and I.L.R. 55 Mad. 262, referred to.

M. Patanjali Sastri and *P. S. Raghavarama Sastri* for Petitioner.

B. Somayya for Respondents.

B. V. V.

Varadachariar and Abdur Rahman, JJ.
19th October, 1937.

A. S. No. 196 of 1932.

Mutt and Matadhipathi—*Alienation by—Court-sale—If I.L.R. 44 Mad. 831 will apply or I.L.R. 46 Mad. 751—Adverse possession.*

The plaintiff instituted the suit on the footing that he is the present *matadhipathi* of *S* mutt and that the suit properties formed part of the properties of the mutt. The plaintiff sued for recovery of the properties from the defendants, who are in possession in pursuance of a Court auction purchase in 1906. This Court sale was held in execution of a decree obtained on a mortgage executed in 1899 by one *S*, who, it is said, was a kind of joint *matadhipathi* with *A*, the plaintiff's predecessor-in-title. As the defendants are in possession since 1906, they pleaded title by adverse possession. *A* died only in 1919 and this suit was filed in 1927. The lower Court held that the involuntary character of the

sale precluded the application of I.L.R. 44 Mad. 831 to this case and that it came within the principle of I.L.R. 46 Mad. 751.

Held, that it is not a correct statement of the distinction. Where property is held on trust in the strict legal sense, adverse possession may begin to run from the date of the alienation or Court sale, if the alienation or sale was void, for instance when it was made for the discharge of the private debts of the trustee. This case was argued on the footing that the properties were not trust properties but only mutt properties of which the *matadhipathi* was the manager. As stated in I.L.R. 12 Pat. 251, the material question is whether the transaction is one which, though not binding upon the institution, can be held to be good for the lifetime of the particular *matadhipathi*. If the property is not held on strict trust, *prima facie* a mortgage by the *matadhipathi* for an alleged mutt purpose will be binding on the mortgagor and on the mutt properties during the tenure of his office; the execution sale which follows the decree obtained on the mortgage is nothing more than the working out of the mortgage. So it is not correct to regard the execution sale as introducing a new principle for the purpose of determining the question of limitation. So plaintiff will be entitled to claim that limitation should be reckoned only from the date of *A's* death.

T. S. Nataraja Pillai for Appellants.

K. S. Desikan for Respondents.

S. V. V.

Varadachariar and Abdur Rahman, JJ. A. S. No. 56 of 1932.

21st October, 1937.

Deed—Construction—Compromise—Estate given to the widow under the deed—If an absolute estate or a limited estate.

Up to December, 1888, Zemindari *B* was in the possession of one *K*, who died in December, 1888, leaving him surviving a widow *Ka*, a daughter *M* and a step-brother *V*. For many years after 1888 every person connected with this family seems to have proceeded on the footing that this step-brother *V* was disqualified to inherit. The deceased Zemindar had an uncle *Vi*, the grandfather of the first defendant. *Vi* had a son *Kn* who was the plaintiff in O. S. No. 16 of 1889, which was compromised by Ex. B. On the death of *K* disputes arose as to the succession to the Zemindari. Pursuant to certain statements made by the uncles and *Kn* the estate was registered by the Collector in the name of the widow *Ka*. Suit O. S. No. 16 of 1889 was filed by *Kn* on foot of the Zemindari having come to him by survivorship. That suit was compromised

by Ex. B. As regards the Zemindari, the arrangement was that the widow should enjoy it for her life and that *Kn* and his heirs should take it after her death. With regard to certain other properties cl. (6) provided as follows:—"Excluding the said Zemin, the buildings within the palace of Kasba *B*, in the enjoyment of the first defendant, and the nanja, punja and garden lands . . . . . . which belonged to the deceased *K* or which were in his enjoyment in the said Zemin or in other places, shall be held and enjoyed by the first defendant and her heirs, with absolute rights, with powers of alienation by way of gift, exchange, sale, etc., so that the plaintiff and his heirs may not have subsequent claim thereto". Cl. (7) provided "the immovable and movable properties acquired during the lifetime of the said first defendant, either out of the income of the Zemin or out of any other funds, shall exclusively belong to the first defendant with powers of alienation . . . . further after her death, they shall belong to the said first defendant's own heirs".

Held, that the properties covered by cl. (6) and cl. (7) were both taken by the widow absolutely. It may be that if cl. (6) made no reference to heirs at all or to unrestricted powers of disposition but merely granted the estate *simpliciter* to the widow, it would be possible to infer that only a woman's estate and not an absolute estate was intended to be conferred on the widow. But when the clause expressly says that the widow and her heirs should take the property with absolute rights, with powers of alienation, it is not reasonable to say that the words do not connote what their natural meaning conveys. ' Her own heirs ' in cl. (7) was so used, as many cases then held that her savings and investments would pass as part of the main estate and it was not intended to render the " heirs " in cl. (6) refer only to the husband's heirs. The antithesis was between a claim that these acquisitions should pass with the zemindari and a claim that they should pass to the woman's heirs.

K. V. Krishnaswami Aiyar, C. A. Seshagiri Sastri and *K. Chandrasekhara Aiyar* for Appellant.

S. Srinivasa Aiyangar, K. Rajah Aiyar, P. N. Appusami and *D. Ramaswami Aiyangar* for Respondents.

S.V.V.

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[F.B.]

The Chief Justice, Varadachariar and King, JJ.
22nd October, 1937.

O. P. No. 173 of 1936.

Income-tax—Company—Lending moneys—Income largely from such transactions—Clause that borrower must become a

member—Membership fee nominal—Also returnable later—If company a banking concern or a mutual benefit society.

After the decision in 2 Income-tax Cases 386, with regard to this very fund, holding that it was to be treated as a banking concern and not as a mutual benefit society inasmuch as the fund had made considerable profits out of lending money to non-members, the fund altered the memorandum and articles of association by requiring that a person who required a loan must become a member; but he could become a member on payment of one rupee, which he was entitled to withdraw at the end of 2 years. The ordinary shares have been issued to persons who, under the former scheme, would have been non-member borrowers. Unlike I.L.R. 47 Mad. 1, in this case the fund obtained considerable income from loans to non-members. No doubt it now only gives loans to persons who become 'members' but it was found that the membership was merely nominal and the company carries on in reality the same business as it did before alteration of the memorandum and articles of association.

Held, that a person who wants a loan can obtain one from this company, if he pays one rupee for a share and that also is to be paid back to him after 2 years. Out of a gross income of Rs. 33,954-7-8 in the year ending March, 1930, a sum of Rs. 14,217-13-9 represented interest on loans granted to such members and only Rs. 139-11-4 was paid to them as dividend. The large profits which the company made were distributed to its real shareholders. By borrowing from the company, these members made large profits for the company in which they were not allowed to share. In these circumstances the company cannot contend that it is a mutual benefit society and its income is not taxable. The borrowers become members, but members in name only, as their membership does not give them the benefits of members of a mutual benefit society.

(1897) 2 Q.B. 402, followed.

N. Srinivasa Aiyangar for Assessee.

M. Patanjali Sastri for Income-tax Commissioner.

S.V.V.

[F. B.]

The Chief Justice, Varadachariar and King, JJ. O. P. No. 181 of 1936.

13th October, 1937.

Privy Council—Petition for leave to appeal—Income-tax case—Appeal satisfying the requisites for appeal—If respondent can object on the ground that he cannot bear the costs of appeal—Court if can direct petitioner to pay for costs of appeal here.

Where an application for leave to appeal is made by the Commissioner of Income-tax and there is a substantial question of law involved in it, and it otherwise satisfies valuation, etc., it is not a ground to refuse leave merely because it would put the assessee to considerable expense. No condition can be imposed that the Income-tax authorities should pay his costs. It is for the Privy Council to decide the question of costs.

44 M.L.J. 217, referred to.

M. Patanjali Sastri for Petitioner.

M. Subbaraya Aiyar for Respondents.

S. V. V.

Varadachariar and King, JJ. Appeal No. 238 of 1932.

26th October, 1937.

Hindu Law—Maintenance—Arrears of—Award of—Principles.

It is stating the legal position too high to say that the award of arrears of maintenance to a Hindu woman is a matter of discretion. The result of the authorities rather is that the plaintiff is entitled to arrears unless there is anything in her conduct precluding her from making that claim or anything to suggest that the defendant might have been misled.

P. V. Rajamannar and *K. Subba Rao* for Appellant.

K. V. Gopalaswami and *M. Sriramamurthi* for Respondents.

S. V. V.

Varadachariar and Pandrang Row, JJ. Appeal No. 87 of 1937.

29th October, 1937.

Appeal—Civil Procedure Code, O. 7, r. 11—If applicable to appeals—Application under S. 149—Dismissal of—Appeal barred when deficient court-fee paid—If appeal barred by limitation.

The memorandum of appeal was filed on 23rd March, 1935, which was within the time allowed by law, but with a court-fee of Rs. 5 while memo. of appeal stated the proper fee was Rs. 224-15-0. The papers were returned on more than one occasion for various purposes and on 15th July, 1935, the valuation was amended

N.R.C.

making Rs. 111-5-0 as the correct court-fee payable. This too was not paid for some time and finally an application was filed under S. 149, Civil Procedure Code, for extension of time to pay deficient court-fee and also the court-fee was paid. But by that time, the time for appeal had expired. The petition under S. 149, Civil Procedure Code, was dismissed but it was argued that nevertheless the memo. of appeal cannot be held not to have been in time because on the analogy of O. 7, r. 11 the appellants ought to have been called upon within a time fixed to pay the deficient court-fee and that until that had been done it is not open to the Court to reject the appeal.

Held, O. 7, r. 11 does not apply to appeals.

27 M.L.J. 677; I.L.R. 61 Cal. 663; I.L.R. 1 Lah. 236; 3 Pat. L.J. 74 and I.L.R. 50 All. 980, followed.

In view of the provisions of S. 4 of the Court-Fees Act, it cannot be said that the mere filing of a paper without the proper court-fee amounts to a proper presentation of the appeal for all purposes. Also S. 149, Civil Procedure Code, itself seems to imply that in the absence of an order granting time under S. 149 the presentation of the unstamped or insufficiently stamped memo. of appeal will not amount to a valid presentation. The petition under S. 149 having been dismissed the appeal must be dismissed as not presented in time.

P. Satyanarayana Rao for Appellants.

Ch. Raghava Rao for Respondents.

S. V. V.

Varadachariar and King, JJ. Appeal No. 292 of 1932.
1st November, 1937.

Hindu Law—Father—Business started by—Liability of sons—Personal liability of, by virtue of pious obligation doctrine.

All that I.L.R. 54 All. 564 says is that no charge could be created over the joint family property to secure the repayment of money borrowed for a business started for the first time by the father of a Mitakshara joint family. The Privy Council do not suggest that the sons could not be liable in respect of the debts thus borrowed even under the pious obligation doctrine. The mere fact that a father cannot create a valid charge in respect of such a debt does not exclude the application of the pious obligation doctrine to such debts.

P. V. Vallabacharyulu for Appellant.

P. Somasundaram for Respondent.

S. V. V.

Varadachariar, J. C. R. P. No. 1347 of 1936.
3rd November, 1937.

Court-fees—Malabar tavazhi—Suit for partition—Debts and mortgages by karnavan—Court-fee payable.

A suit was brought for partition of certain tavazhi properties on the footing that the plaintiff is a junior member thereof and that the suit properties are tavazhi properties. The first defendant is the karnavan of the tavazhi. The plaint refers to certain mortgages and debts and alleges that these are not binding on the tavazhi. In regard to one item, the plaintiff contended that as the karnavan is still in possession of that item, he should not be called upon to pay court-fee so far as regards that item.

Held, following I.L.R. 53 Mad. 540 that court-fee ought to be paid. On the date of suit the first defendant's possession was not on behalf of the tavazhi as per the plaint. Therefore court-fee must be paid under S. 7 (5).

In respect of the debts, the plaint says that they are not binding on him or his tavazhi and has made the creditors also defendants. The plaintiff offered in the High Court to make an amendment of the plaint by limiting the prayer in the plaint to a decision of the question whether the particular item is tavazhi or personal property of the first defendant. The amendment was allowed. The mortgage on this item was made on the footing that this was first defendant's individual property.

Held, on this item no court-fee need be paid on mortgage amount but it is enough if he pays under S. 7 (5). The view in 64 M.L.J. 24 that if the plaintiff in a partition suit attacks a mortgage of joint family property made by the manager and asks for a declaration that the mortgage is not binding on his share he is bound to pay court-fee in respect of such declaration under Art. 17-A (1) doubted, on the ground that it does not consider the question whether such a suit can be regarded as a suit for declaration where no consequential relief is prayed for.

Held, that as regards the debts it is not correct to say that a prayer in a partition suit relating to the binding character of particular debts can be regarded as a prayer in a suit where consequential relief is not prayed for, inasmuch as it is held in I.L.R. 50 Mad. 535 and I.L.R. 17 Lah. 657 that in a partition suit it is proper to make provision for the discharge of family debts.

Once it is recognised as the duty of the Court to make provision for the discharge of binding debts before partition is decreed the suit should be dealt with as one in which consequential relief is prayed for.

I.L.R. 58 Mad. 821 and (1937) 2 M.L.J. 616, not followed.

D. A. Krishna Wariar for Petitioner.

K. Kuttikrishna Menon for Respondent.

K. S. Champakesa Aiyangar for *The Government Pleader* (*K. S. Krishnaswami Aiyangar*) for the Government.

S. V. V.

Varadachariar and King, JJ. Appeal No. 378 of 1932.
4th November, 1937.

Malabar Law—Karnavan—Powers of—Karnavan taking a share in a kuri chit—Tarwad properties charged—If binding on tarwad—Test of binding nature of the transaction.

Where a karnavan of a tarwad executed a security bond as karnavan charging the tarwad properties with the repayment of monies due for 14 instalments in respect of a kuri chit in respect of which he (karnavan) had taken one share, the transaction and the validity of the bond has to be looked at more from the point of view of considering whether it was a prudent exercise of discretion on the part of the karnavan to enter into the chit transaction.

A. S. No. 218 of 1911 (Benson and Sundara Aiyar, JJ.) and 2 Tr.L.J. 443, followed.

These transactions should be viewed not with reference to the rigorous test applied when determining the validity of a borrowing but with reference to considerations of prudence and an honest exercise of discretion by the karnavan in the light of all the circumstances of the case.

B. Sitarama Rao and *N. A. Krishna Aiyar* for Appellant.

T. R. Venkatarama Sastri, A. Sivarama Menon and *Parakat Govinda Menon* for Respondents.

S. V. V.

Pandrang Row, J. C. R. P. No. 384 of 1935.
12th November, 1937.

Civil Procedure Code (V of 1908), O. 41, rr. 27 and 29—Additional evidence—Admission in appeal—Principles governing.

Where additional evidence was tendered to the appellate Court on the ground of its having been discovered subsequent to the judgment of the first Court and that an application for review was unsuccessful, and the appellate Court allowed the additional evidence to be marked as exhibits on the ground that it was necessary to do so "in the interests of justice" but the Court in allowing the appeal finally observed that it did not base its finding on the additional documents which had been perused by the Judge and which pointed to the same conclusion to which the learned Judge had already arrived,

Held, (1) that the appellate Court had no jurisdiction under O. 41, r. 27, Civil Procedure Code, to admit additional evidence unless it required it, that is, finds it needful for the purpose of enabling it to pronounce judgment;

I.L.R. 31 Bom. 381 (P.C.) and I.L.R. 10 Pat. 654 (P.C.), relied on.

(2) that the formula "that it is necessary in the interest of justice" is not enough to satisfy the provision of O. 41, r. 27 (2) which requires the Court to record its reasons for admitting additional evidence;

(3) that where additional evidence is directed to be taken the appellate Court should specify the point to which the evidence is to be confined as required by O. 41, r. 29, Civil Procedure Code; and

(4) that in such cases the opposite party should be given an opportunity to adduce further evidence in rebuttal thereof.

T. R. Venkatarama Sastri and *T. S. Venkatesa Aiyar* for Petitioner.

V. Radhakrishnayya, V. Rajagopala Aiyar and *T. V. Ramiah* for Respondents.

B. V. V.

[F. B.]

The Chief Justice, Varadachariar, Burn, King and Venkataramana Rao, JJ. S. A. No. 393 of 1937.
15th November, 1937.

Madras Court-Fees Act (VII of 1870)—Suit for account, etc.—Relief for account valued by plaintiff—Preliminary decree—Appeal against by defendant—If defendant bound by plaintiff's valuation or can value as he pleases—Final decree—Appeal—Court-fee on amount decreed.

N.R.C.

In a suit for recovery of possession of immovable property and for an account filed in the Court of the Subordinate Judge of Madura, the plaintiff valued his relief, so far as it concerned his claim for an account, at Rs. 3,000. He obtained a preliminary decree, which was followed in due course by a final decree, by which he was declared entitled to recover a total sum of Rs. 32,000. The preliminary decree was appealed against and pending that appeal before the District Judge, the final decree was passed. An appeal was filed against that also and both were heard together by the District Judge. As a result it was held that the plaintiff was entitled only to recover Rs. 6,554-5-2. The defendants appealed then to the High Court and valued their relief at Rs. 100 paying a court-fee of Rs. 11-3-0 thereon and the office accepted it in view of I.L.R. 56 Mad. 705. When the appeal came on for admission before Burn, J., he questioned this right of the plaintiff to value as he pleased and referred the question of the correctness of I.L.R. 56 Mad. 705 to a Full Bench.

Held, that wording of S. 7, cl. (iv) (*f*) and S. 11 read in the light of the history of the section suggest that the defendant was not within the contemplation of those who were responsible for the drafting of the Act. But the Courts in India have always regarded S. 7 (iv) (*f*) as applying to appeals by defendants as well as to appeals by plaintiffs. Even assuming this to be so, it has been understood in this presidency in I.L.R. 23 Mad, 490 and I.L.R. 39 Mad. 725 (F.B.), that a defendant appealing from a preliminary decree for an account has to stamp his memorandum of appeal according to the plaintiff's valuation. Though this decision has not found general acceptance by the other High Courts (*see* I.L.R. 47 All. 756), no reason has been shown to disturb this practice. Even if the effect of I.L.R. 39 Mad. 725 means reading into the clause something which is not there, it does not read into it anything more than those who prefer the Allahabad opinion would read into it.

But when a defendant appeals against the final decree, he knows exactly the value of his relief and must pay court-fee on the amount of the decree passed against him.

I.L.R. 56 Mad. 705, overruled.

I.L.R. 10 Lah. 737, discussed and distinguished as also a case of plaintiff.

K. Raja Aiyar and *R. Rangachari* for Appellant.

K. S. Krishnaswami Aiyangar (*Government Pleader*) and *N. Srinivasa Aiyangar* for Government.

S. V. V.

Pandrang Row and Abdur Rahman, JJ. L. P. A. No. 11 of 1936.
11th November, 1937.

Civil Procedure Code (V of 1908), O. 21, r. 2 and O. 34, rr. 4 and 5—Agreement between the plaintiff (decree-holder) and one of the defendants in a mortgage suit after preliminary decree but before final decree that the plaintiff will not proceed in execution against some of the items—Final decree passed and execution taken by the plaintiff against all the items—If defendant can set up the agreement in bar of execution.

In a mortgage suit after the preliminary decree was passed an agreement was alleged to have been entered into between the plaintiff and one of the defendants that the plaintiff will not proceed in execution against some of the items of the mortgaged property. After this a final decree was passed for sale of all the mortgaged properties and the plaintiff attempted to sell the properties included in the agreement. The defendant then set up the above agreement in bar of execution and the question arose whether the agreement was one which fell under O. 21, r. 2, Civil Procedure Code, and can be set up in bar of execution. In second appeal Wadsworth, J., held that the agreement being one after the preliminary decree is within O. 21, r. 2 and therefore cannot be set up in execution.

Held, that the agreement can be set up in execution as it did not go in any way against the provisions of the preliminary decree nor did the agreement contemplate any modification of the final decree. Being simply an agreement that the plaintiff should not execute the final decree against certain items it fell within the Full Bench rulings in I.L.R. 40 Mad. 233 and I.L.R. 58 Mad. 994.

K. P. Ramakrishna Aiyar for Appellant.
K. S. Champakesa Aiyangar for Respondent.
S. V. V.

[F.B.]
The Chief Justice, Varadachariar and King, JJ. Appeal No. 287 of 1932.
19th November, 1937.

Limitation Act (IX of 1908), Arts. 36 and 120—Trustees of a public temple—Dues to temple uncollected by a prior trustee—Suit against prior trustee by succeeding trustee—Art. 120 applicable—Starting point.

The plaintiffs and the third defendant were the trustees of a temple on the date of the institution of the suit. The first defendant was the managing trustee of the temple from 1921 to September, 1927. The second defendant is said to have been the trustee

from 26th July, 1914, to 8th February, 1928; the third defendant was appointed trustee on 22nd May, 1927, while the plaintiffs were appointed trustees only in June and July, 1928. The suit was instituted on 15th September, 1930, claiming that the defendants should be directed to pay certain amounts to the plaint temple which were due to the temple but were found to be uncollected and as many of them had become barred the temple had been put to loss thereby. There was a further allegation that in respect of items which had become barred even before the defendants took office, the defendants would be liable to the temple by reason of their failure to take steps against their predecessors in office to recover damages under that head. To this claim the defendants pleaded bar of limitation under Art. 36 of the Limitation Act. In view of the conflict between I.L.R. 20 Mad. 398 and I.L.R. 33 Mad. 308, their Lordships Varadachariar and King, JJ., referred to a Full Bench the questions whether Art. 36 or Art. 120 is the proper article applicable to a suit filed against a trustee or ex-trustee to recover the loss sustained by the trust by reason of his omission to collect moneys due to the trust and if Art. 120 is applicable, what is the starting point.

Held, by the Full Bench, that Art. 36 could not apply to such suits and the only article which can apply to a suit like this one is Art. 120. As for the starting point of limitation, it depends on whether there is a sole trustee or a number of trustees and whether it is a private trust or a public trust. If there is only one trustee of a public trust and he commits a breach, there is no person capable of suing and therefore the right to sue commences only when a new trustee had been appointed. If there are other trustees who are themselves not liable, the period of limitation will start running immediately the loss is occasioned, because they will have in themselves the right to sue their co-trustee for the loss occasioned by him. If the co-trustees have also made themselves liable for the breach of trust, the position would be the same as in the case of a defaulting sole trustee. In the case of a private trust, the *cestui que trust* would ordinarily have the right to sue from the date of the breach of trust. It will, therefore, depend on the circumstances when time will commence to run.

V. Rajagopala Aiyar for Appellant.

K. Rajah Aiyar and *V. Ramaswami Aiyar* for Respondent.

S. V. V.

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Varadachariar and King, JJ. Appeal No. 172 of 1932.
3rd November, 1937.

Limitation Act (IX of 1908), Ss. 22, 28 and Art. 44—Ward's suit against original alienee within 3 years of attaining majority—Alienee from original alienee added as defendant after 3 years—Art. 44 applicable—Deed—Construction—Use of the word 'jointly' in a gift by a Muhammadan to two donees 'jointly'—Whether connotes survivorship.

In a suit by a Muhammadan ward on attaining majority to set aside a sale made by his father guardian and recover possession of the properties sold, certain alienees of portions of the property from the original alienee were added as defendants after 3 years of the ward's attaining majority, *held*, that as regards the properties in their possession the suit was barred. I.L.R. 23 Mad. 271 (P.C.), referred to.

In a deed of gift made by a Muhammadan in favour of his two grandsons 'jointly' and drawn up in the English form, the mere use of the word 'jointly' in the conveying portion does not conclude that the donees were to take the property as 'joint tenants'. In the absence of other indications in the deed itself that survivorship as between the donees was intended, they would take the property in accordance with what would be consistent with their own personal law, namely, as tenants in common.

I.L.R. 23 Cal. 670 (P.C.), relied on.

T. M. Krishnaswami Aiyar and *K. S. Rajagopala Aiyangar* for Appellant.

C. S. Venkatachariar and *S. Sankara Aiyar* for Respondents.

S.V.V.

Venkataramana Rao, J. C. R. P. No. 722 of 1935.
12th November, 1937.

Provincial Insolvency Act (V of 1920)—Application under S. 54—District Judge transferring the same to the Subordinate Judge—Subordinate Judge's Court having no jurisdiction in this insolvency—Transfer invalid.

The Official Receiver preferred an application under S. 54, Provincial Insolvency Act, to set aside a sale by the insolvent and the District Judge transferred the application to the Sub-Judge for disposal. The Sub-Judge dismissed the application and the District Judge set aside the sale. The vendee preferred the revision. The High Court called for a fresh finding and the finding was that the sale was not a sham transaction. It was discovered at the further hearing in the High Court that the application arose in an insolvency which was not within the jurisdiction of the Sub-Court but of the District Court.

Held, that the order of transfer was without jurisdiction and therefore the proceedings were set aside and the District Judge was directed to withdraw the application and dispose of it afresh.

45 L.W. 313, followed.

K. S. Champakesa Aiyangar for Petitioner.

T. E. Ramabhadrachariar for Respondent.

S. V. V.

Pandrang Row, J. C. M. A. No. 123 of 1936.
19th November, 1937.

Provincial Insolvency Act (V of 1920), S. 51—Execution sale —Purchase by appellant, with knowledge of insolvency petition but before adjudication—If purchase bona fide—*Validity of sale, against receiver—Court, if can decide the same under S. 4 of the Act.*

Certain properties which belonged to the insolvents, against whom a creditor's petition to adjudicate them as insolvents was admitted in October, 1932, were sold in Court auction. Notice of the petition was published in the Gazette on 14th January, 1933. After publication in the Gazette, the appellant, another creditor, who was represented throughout by her agent and who took part in a prior attempt to bring about composition, brought the properties to sale with knowledge of the insolvency petition but without informing the Court of the pending insolvency petition and purchased the same and was permitted to set off the purchase money against the appellant's decree amount. The adjudication order in the insolvency was subsequently made and the properties were vested in the Official Receiver, who filed an application to have the sale set aside and for possession of the properties sold in the said Court sale.

Held, that the appellant was not a *bona fide* purchaser or in other words did not purchase in good faith when she purchased the properties of the insolvents and as such was not protected by S. 51 (3) of the Provincial Insolvency Act. The sale was invalid since it took place at a time when the Official Receiver was in law vested with the properties.

Held, further, that the Court had jurisdiction to decide claims of this kind under S. 4 of the Act for the purpose of complete distribution of the property among creditors.

I.L.R. 59 Mad. 928, referred to and explained.

N. S. Srinivasan for Appellant.

K. Kuppuswami for Respondent.

S. V. V.

King, J. S. A. No. 703 of 1936.
1st December, 1937.

Mortgage—Suit by first mortgagee without impleading second mortgagee—Suit by second mortgagee without impleading the first—Decrees in both—Sales in execution—Defendant (first mortgagee purchaser) earlier purchaser—Suit by later purchaser to redeem him—Liability of first purchaser to account for profits received by him.

Properties *A* and *B* were mortgaged to the defendant and property *A* was mortgaged to the plaintiff. Each instituted a suit on his mortgage without impleading the other and bought the properties in Court auction, the defendant being the earlier purchaser.

As the second mortgagee purchaser could not get possession of the item *A* bought by him, the present suit was brought to redeem the defendant.

The lower appellate Court directed redemption and also directed an account of the profits received by the defendant from the date of delivery of possession.

In an appeal by the defendant against the liability to account and the date from which he had to account.

Held, that the first mortgagee defendant was bound to account for the profits received by him from the date of delivery of possession under the prior sale.

46 L.W. 332, applied.

S. Amudachariar for Appellant.

T. E. Ramabhadrachariar for Respondent.

S. V. V.

Pandrang Row and King, JJ. A. S. No. 363 of 1931.
6th December 1937.

Civil Procedure Code (V of 1908), S. 34 (2)—Decree for maintenance—Provision for maintenance—Charge on immovable property created by decree—Decree for payment—Interest on future instalments—Court to be deemed to have refused if decree is silent.

A decree for maintenance though it provides for payment of money in future for future maintenance and though a charge on immovable property is created by the decree, is nevertheless a decree for payment of money within the meaning of S. 34, Civil Procedure Code, and where such a decree is silent with respect to the payment of interest on future instalments of maintenance, the Court shall be deemed to have refused such interest and a

separate suit therefor is barred under S. 34 (2), Civil Procedure Code.

I.L.R. 3 Cal. 602 and I.L.R. 53 Cal. 42, distinguished.

G. Lakshmanna and *G. Chandrasekharasastry* for Appellants.

B. V. Ramanarasu for Respondents.

K. C.

[F. B.]

The Chief Justice, Varadachariar and Mockett, JJ. Case Referred No. 4 of 1936.
6th December, 1937.

Stamp Act, Arts. 40 and 57—Security bond by sureties under S. 21 (1) of Provincial Insolvency Act—Bond by sureties only—Article of Stamp Act applicable.

One *C* applied under the Provincial Insolvency Act to be adjudged an insolvent and under S. 21 (1) was required to give a bond with two sureties for his due appearance in the insolvency proceedings. A bond for Rs. 4,500 was accordingly executed by two sureties in favour of the Sheristadar of the Court and was stamped under Art. 57 of the Stamp Act. The Board of Revenue referred the question "whether the document, a security bond for Rs. 4,500 executed in pursuance of an order of the Court hypothecating also immovable property, should be stamped under Art. 40, Sch. I or under Art. 57, Sch. I of Indian Stamp Act" corresponding to Arts. 33 and 46 of the Madras Stamp Amendment Act, 1922. The bond here was not executed by the debtor but merely by the sureties.

Held, approving 40 C.W.N. 1281 and I.L.R. 52 All. 844 that the obligation undertaken by the sureties was not an obligation connected with the performance of a contract by the insolvent and therefore Art. 40 and not Art. 57 is the appropriate article.

K. S. Krishnaswami Aiyangar (Government Pleader) for Government.

S.V.V.

Pandrang Row and King, JJ. Appeal No. 76 of 1933.
7th December, 1937.

Contract Act (Old Act), S. 178—Possession—Good faith—Meaning of.

The first defendant, a commission agent employed to sell a car belonging to the plaintiff wrongfully pledged it to the second defendant who lent the amount *bona fide* without any knowledge of the plaintiff's ownership. The plaintiff coming to know of the wrongful pledge sued for the recovery of the car or its value.

Held, that as the second defendant was a pawnee in good faith from one who had juridical possession of the car, the plaintiff was not entitled to recover the car without paying the second defendant the amount due to him on the pledge. The definition of " good faith " in S. 3 of the General Clauses Act applies to the Contract Act as well.

W. Kothandaramiah for Appellant.

M. Krishna Barathi and *S. Seshadri* for Respondent.

S.V.V.

Pandrang Row and Abdur Rahman, JJ. L. P. A. No. 33 of 1936.

10th December 1937.

Res judicata—*Co-defendants — Conditions to be satisfied—Conflict of interests between co-defendants—Mere possibility of conflict not enough—Actual conflict necessary.*

O. S. No. 10 of 1921 was filed by *A* as a reversioner against *B* and 21 other defendants for recovery of the estate of *X* the last male holder. *C*, another person claiming as an assignee of the rights of *Y*, contended that he was a nearer reversioner than the plaintiff and wanted to be impleaded as a defendant. *B* did not contest the plaintiff's suit and became *ex parte*. *C* was added as the 23rd defendant after *B* had become *ex parte*. The trial Court found that both *A* and *C* were reversioners of equal degree and passed a decree in favour of both. On appeal by some only of the defendants the Subordinate Judge, finding that neither *A* nor *C* had proved his relationship to the last male holder dismissed the suit in its entirety. On second appeal to the High Court, their Lordships held that the suit should not have been dismissed as against non-appealing defendants also, and in that view restored the decree of the District Munsiff as against the non-appealing defendants but confirmed the finding of the Subordinate Judge that *A* and *C* had not proved their reversionary right. (This judgment is reported in A.I.R. 1928 Mad. 1144.)

Subsequently *B* filed a suit against *A* and *C* for recovery of the estate of *X* on the ground that he was the sister's son of the deceased last male holder '*X*' and that *A* and *C* had no right to the estate.

It was contended on behalf of *C* that the decree in the previous suit O. S. No. 10 of 1921 operated as a bar to the present suit on the principle of *res judicata* between co-defendants.

Held, (1) that as *B* had become *ex parte* before *C* came on record, it could not be said that he was running away from issues of which he has never heard, namely, *C's* claim.

(2) that of the three conditions for *res judicata* between co-defendants enunciated in I.L.R. 53 All. 103 (P.C.), the first condition that there must be a conflict of interest between the defendants could not arise at all and that therefore there was no bar of *res judicata* between the co-defendants.

(3) it is not sufficient that there was a mere possibility of conflict between the defendants *inter se*, there must in fact be an actual conflict between them.

61 M.L.J. 415 (P.C.), referred to and followed.

A.I.R. 1928 Mad. 630, followed.

A.I.R. 1926 Cal. 568; I.L.R. 26 Mad. 104; I.L.R. 28 Mad. 517 and I.L.R. 30 Mad. 461, referred to.

B. V. Ramanarasu for *M. Ramachendra Rao* for Appellant.

B. Somayya and *A. Bhujanga Rao* for Respondents.

S.V.V.

Lakshmana Rao, J. Crl. R. C. No. 443 of 1937.

10th December, 1937.

Indian Penal Code, S. 409—Collections by Village Munsif—Failure to remit into treasury immediately—Remitting the same before complaint—Defence disbelieved—If Village Munsif necessarily guilty.

A Village Munsiff collected fish rent but failed to remit the same immediately. He remitted to the treasury in three instalments. His plea that the Revenue Inspector collected the amounts and it was remitted as and when it was handed over to him by the Revenue Inspector was disbelieved.

Held, in revision, that the fact that the defence was disbelieved cannot lead to a conviction as the Village Munsiff has not been shown to be needy and the money was paid before any complaint was preferred. It might be due to carelessness.

K. S. Jayarama Aiyar and *T. E. Ramabhadrachariar* for Petitioner.

The Public Prosecutor for the Crown.

S.V.V.

(END OF VOL. II)